United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT [redacted] CIRCUIT

No. [redacted]288 7713

Lawrence W. Green,

Appellant,

v.

United States of America,

Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR G. LAMBERT
Attorney for Appellant
(By Appointment of This Court)

200 Davis Building
1629 K Street, N. W.
Washington, D. C. 20006

STATEMENT OF QUESTIONS PRESENTED

1. Whether the standard to be followed in determining the voluntariness of a confession when insanity is used as a defense is, as the trial court held, did the appellant have the mental capacity to make a voluntary confession?

2. Whether the trial court was correct in finding at the conclusion of the hearing on remand that the government had proven beyond a reasonable doubt that the confession used against appellant at trial was voluntary?

3. Whether the trial court erred in denying appellant's motion for a directed verdict at the hearing on remand when it was shown that the confession used against appellant at trial was obtained after an "unnecessary delay" in arraignment in violation of Rule 5(a) of the Federal Rules of Criminal Procedure?

4. Whether the case of Pate v. Robinson, 383 U.S. 375 (1966), overrules Green v. United States, 122 U.S. App. D.C., 351 F.2d 198 (1965), which would entitle appellant to a new trial?

TABLE OF CONTENTS

INDEX TO CITATIONS

INDEX TO CITATIONS

INDEX TO CITATIONS

INDEX TO CITATIONS

*Cases principally relied on are marked by asterisks.

Lawrence W. Green,

Appellant,

v.

United States of America,

Appellee.

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered on June 6, 1966, by The Honorable David A. Pine, Judge, finding that the confession of the appellant that was introduced at the trial of this case was voluntary.

Appellant was granted leave to proceed on appeal in forma pauperis by the United States District Court for the District of Columbia, and was appointed counsel by the United States Court of Appeals for the District of Columbia Circuit.

Jurisdiction of this Court is invoked pursuant to the Act of June 25, 1948, C. 646, 62 Stat. 929, U.S.C.A. §28-1291.

STATEMENT OF THE CASE

Criminal Case No. 891-60

Appellant, Lawrence W. Green, was indicted on October 24, 1960, for violating §22-2901 of the District of Columbia Code, as amended August 9, 1955. He was charged on four counts with having on August 26, September 5, September 17 and September 21, 1960, committed robbery within the District of Columbia. He pled not guilty to each count.

Prior to the trial in the above case, George A. Pope, court appointed defense counsel, moved for an examination of the mental competency of defendant to stand trial, pursuant to §24-301(a) of the District of Columbia Code, as amended August 9, 1955. Lawrence W. Green was sent to St. Elizabeths Hospital for a period of ninety days for examination by the psychiatric staff of that hospital pursuant to an order signed December 1, 1960.

On March 17, 1961, Dale C. Cameron, Superintendent of St. Elizabeths Hospital, sent a written report to the Court regarding the mental condition of Lawrence W. Green and stated:

> "Mr. Lawrence W. Green (Criminal No. 891-60) was committed to St. Elizabeths Hospital on December 1, 1960, for a period not to exceed ninety days, upon an order signed by Chief Judge David A. Pine, to be

examined by the psychiatric staff of this hospital. It was further ordered that a written report of our findings be submitted to the Court regarding the patient's mental condition, mental competency for trial, mental condition on or about August 26, September 5, September 17, and September 21, 1960, and casual connection between the mental disease or defect, if present, and the alleged criminal acts. . . .

". . . We conclude, as the result of our examination and observation, that Lawrence W. Green is mentally competent to understand the proceedings against him and to assist properly with counsel in his own defense. It is our opinion that he is suffering from mental disease now, was suffering from mental disease on or about August 26, September 5, September 17, and September 21, 1960, and that an act of the type alleged could have been a product of the mental disease." (Emphasis supplied.)

The letter also stated that appellant's diagnosis was that he suffered from a mental disease, schizophrenic reaction, chronic undifferentiated type, with paranoid tendencies (See file in Cr. No. 891-60).

Lawrence W. Green was brought to trial on April 10, 1961. He was found not guilty by reason of insanity by direction of the Court and was committed to St. Elizabeths Hospital pursuant to §24-301(d) of the District of Columbia Code, as amended August 9, 1955.

From April, 1961, to August 9, 1962, appellant remained an inmate in the hospital without demanding his

release and the superintendent filed no certificate of recovery. On July 22 and August 2, appellant escaped from the hospital for short periods of time and returned and there was no record of his absence in the hospital records. On August 9, 1962, appellant escaped and was arrested in front of No. 5 Precinct with money taken from the Berens Realty Company in a holdup and robbery and held in jail pending indictment and trial.

Criminal Case No. 799-62

Appellant, Lawrence W. Green, was indicted while still undischarged from St. Elizabeths Hospital on September 28, 1962, for violating §22-2901 of the District of Columbia Code, as amended August 9, 1962. Appellant was charged in a three count indictment with having committed robbery. He pled not guilty to each count.

Before trial was begun in Criminal Case No. 799-62, proceedings were again instituted, upon motion of Paul E. Miller, court appointed defense counsel, for an examination of appellant's mental competency, pursuant to §24-301(a) of the District of Columbia Code, as amended August 9, 1955. Appellant was sent to St. Elizabeths Hospital for a period of ninety days for examination by the psychiatric staff of that hospital.

On February 12, 1963, Dale C. Cameron sent a

second written report to the Court regarding the mental competency of Lawrence W. Green. In the letter Dale C. Cameron stated:

> "Mr. Lawrence W. Green (Criminal No. 891-60), was committed to St. Elizabeths Hospital on April 10, 1961, by order of the United States District Court for the District of Columbia, pursuant to the provisions of Title 24, Section 301(d) of the District of Columbia Code, as amended, after having been found not guilty by reason of insanity. (Emphasis supplied.)
>
> ". . . As a result of our examinations and observation, it is our opinion that Lawrence W. Green is mentally competent to understand the nature of the proceedings against him and to assist counsel properly in the preparation of his defense. It is, further, our opinion that he is, and was, on July 22, August 2 and 9, 1962, suffering from a mental illness, Schizophrenic Reaction, Chronic Undifferentiated Type (In Remission); however, the alleged criminal offenses with which he is charged, if committed by him, were not the product of this mental illness."

After receipt of the letter from the superintendent of the hospital the Court entered no finding that appellant had recovered his sanity and no hearing was had and no order entered adjudicating him of sound mind and competent to stand trial, although the statute requires a judicial finding of competency to stand trial. The Court was aware, or should have been, of appellant's past mental illness by the language of Dale C. Cameron's letter

in which it was stated that appellant was a patient at St. Elizabeths at the time of the alleged robberies by reason of his commitment in 1961 after the verdict of not guilty by reason of insanity in Cr. No. 891-60.

Appellant was brought to trial and a judgment was entered on April 23, 1963, sentencing appellant to from five to fifteen years imprisonment on a jury verdict of guilty as indicted for two counts of violations of §22-2901 of the District of Columbia Code. During the trial, the government offered testimony of an alleged oral confession of defendant and appellant's court-appointed attorney moved to suppress the confession because it was involuntary, but said motion was denied (Tr. in No. 17,841, pp. 113-117).

Appellant was granted leave to proceed on appeal in forma pauperis by the United States District Court for the District of Columbia, and the undersigned attorney was appointed by the United States Court of Appeals for the District of Columbia Circuit.

After two hearings, the second en banc, ordered by the Court sua sponte, this Court, in Green v. United States, 122 U.S. App. D.C. 33, 351 F.2d 198 (1965), remanded the case to the District Court for determination as to whether or not the confession used against appellant in his

trial was voluntary.

While appellant was appealing the verdict in Cr. Tr. No. 799-62, the Superintendent of St. Elizabeths Hospital moved in Cr. Tr. No. 891-60 for appellant's unconditional release pursuant to §24-301(e), D. C. Code. On August 30, 1963, the matter came on for hearing and the District Court, Judge Warren E. Burger sitting, concluded that appellant should be released and serve his sentence (in Cr. No. 799-62) in jail. After less than five months spent in jail, appellant was again sent back to the hospital in January, 1964. Prison officials, pursuant to §24-302, D. C. Code, transferred appellant to the hospital because he was considered to be insane while at the D. C. Jail. On February 2, 1965, appellant was sent to Lorton, Virginia, to continue serving his sentence in jail. Meanwhile, this Court in Green v. United States, 121 U.S. App. D.C. 226, 349 F.2d 203 (1965), an appeal from the decision in the District Court by Judge Burger finding him fit to be sent to jail to serve his sentence, reversed the decision reached by the District Court in Cr. Case No. 891-60.

On October 7, 1965, appellant was transferred from Lorton, Virginia, back to St. Elizabeths Hospital. After further psychiatric examination of appellant was

made at St. Elizabeths Hospital, the matter came on for hearing in the District Court to have the Court determine whether appellant was mentally fit to serve his sentence in prison. A court hearing on the remand in Cr. Tr. No. 891-60 was held and appellant's court appointed counsel introduced independent psychiatric testimony that he was still insane. In February, 1966, Judge Curran entered an order denying the hospital's request for appellant's release from St. Elizabeths. Appellant is currently confined at St. Elizabeths Hospital pursuant to the order entered by Judge Curran which stated that appellant was not fit for release.

The Hearing on Remand

On the Jackson v. Denno, 378 U.S. 368 (1964) type hearing on remand, Judge Pine held a full scale inquiry into appellant's competency to make a voluntary confession.

Testimony at the hearing on remand brought out the following facts as to how the robbery occurred: Appellant escaped on August 8, 1962, the day before the robbery, and purchased a gun at a toy store on 6th and E Streets, N. W. On August 9, 1962, appellant escaped through a hole in the fence at St. Elizabeths Hospital, caught a cab on Nichols Avenue, and rode over to 8th and

Pennsylvania Avenue, S. E. In the Blumer Realty Company office, appellant approached the counter displaying his toy gun and with his left hand held a handkerchief over the lower part of his face and demanded money from the clerk. He put the money handed him in a paper bag and required the clerks to go to the basement (Tr. Vol. V, pp. 277-9). In the process of this he appeared nervous and several times lowered the handkerchief so as to disclose his entire face (Tr. Vol. V, pp. 277-9). On leaving the real estate office at about 12:35 p.m., he walked in a southerly direction openly carrying the paper bag with the money in it. He was next seen about four blocks to the south from Blumer's in front of Precinct No. 5 walking in a southerly direction. At this instance the sergeant of the Precinct had just received a call from one of the clerks at Blumer's reporting the robbery and giving an accurate description of appellant. Appellant was arrested in front of the Precinct with the money reported taken and with the gun in his possession. He also wore the cap and clothes that had been described in detail by the clerk in reporting the robbery to the police (Tr. Vol. I, p. 48; Tr. Vol. Excerpts, pp. 134-6, 139, 140, 146-7). Testimony at the earlier trial showed that appellant was well acquainted with the neighborhood and knew the location of the Fifth Precinct, appellant

having lived with his mother a few blocks away from the Fifth Precinct (Tr. Vol. Excerpts, p. 109).

Detective Barnes testified at the hearing on remand that appellant was brought back to the Fifth Precinct after he was arrested and was advised that he did not have to make any statements and that any statements made could be used in his behalf or used against him at trial in Court (Tr. Vol. I, pp. 4, 5, 22).[1]

Instead of taking appellant before a magistrate or a commissioner without unnecessary delay, as the police were duty-bound to do, appellant was taken to the scene of the holdup (Tr. Vol. I, pp. 5, 6). At Blumer's, the appellant was identified by the employees as being the robber (Tr. Vol. I, p. 8), and the employees also identified the money found on appellant at the time he was arrested as being the money stolen (Tr. Vol. I, pp. 26, 27, 39). Appellant made no confession at Blumer's (Tr. Vol. I, pp. 16, 25; Tr. Vol. V, pp. 270, 271, 282).

After the identification of appellant and the confirmation that the money stolen by appellant was taken

---

1. We note that this advise is misleading. Were an accused to make an exculpatory or self-serving statement, he would not generally be entitled to use it as evidence on his own behalf. Wigmore on Evidence, §1732 (3d Ed. 1940).

from.Blumer's, the police still did not take appellant to a magistrate or a U. S. commissioner. Instead, they returned him to Precinct No. 5 and took appellant up to a room and interrogated him until he confessed to the holdup. (Tr. Vol. I, pp. 9, 16, 18, 28, 32, 36, 52, 82). Although there is a conflict in the testimony as to whether appellant confessed to the holdup at the Fifth Precinct (Tr. Vol. I, pp. 8, 18, 29, 30, 31, 32, 36, 42, 43, 52, 53, 65, 82; Tr. Vol. V, pp. 241, 277, 278), there is no dispute that the confession that was heard by the jury at the trial of the instant case was made back at the Fifth Precinct when the appellant was being interrogated by Detective Barnes (Tr. Vol. I, pp. 44, 45; Tr. Vol. IV, p. 151). In addition thereto, the P. D. Form 163, which was read into evidence at the hearing on remand, states that the confession took place in the detective's office in Precinct No. 5 in the presence of Carol Forgo (Tr.Vol. I, pp. 34, 35, 36, 37; Tr. Vol. Excerpts Supplemental, pp. 136-8).

Appellant called Carol Forgo as a rebuttal witness who had not testified at the trial wherein appellant was convicted, and she testified that appellant made no admissions at the Blumer Realty Co., and that the confession was made after police had brought appellant

back to Precinct No. 5 where Detective Barnes and another officer stood near appellant, who was seated in a chair, and interrogated appellant until he confessed (Tr. Vol. V, pp. 271, 276, 277, 278). Mrs. Forgo's testimony was, therefore, consistent with the statement given by Detective Barnes in P. D. Form 163 that the confession given by appellant occurred at Precinct No. 5. Furthermore, the Grand Jury statements of Detective Barnes and Robert Keahon, read into evidence by appellant, are to the effect that the confession was given back at Precinct No. 5 in the presence of Carol Forgo (Tr. Vol. Excerpts Supplemental, p. 138).

At the hearing it appeared from the evidence that appellant had not been advised of his right to counsel before being interrogated and confessing. Appellant made a motion for a directed verdict after Detective Barnes and Officer Keahon's testimony, on the grounds that there was a violation of Rule 5(a) of the Federal Rules of Criminal Procedure and that appellant had not been advised of his right to counsel and that, therefore, the confession was inadmissible as a matter of law (Tr. Vol. Excerpts, pp. 1-24). It should be noted here that appellee conceded and the Court ruled at the hearing on remand that appellant was not warned of his right to counsel prior to the time

when he confessed at Precinct No. 5 (Ruling of the Court, p. 11). The motion was denied (Tr. Vol. Excerpts, p. 24).

Appellant then put on expert testimony to establish that at the time of the confession, appellant did not know the full implications of what he was saying and that appellant was not capable of understanding the meaning and effect of his confession. Both the psychiatrists called by appellant testified that appellant, at the time he confessed, did not understand the full implication of what he was doing at the time he confessed (Tr. Vol. II, pp. 7, 26, 27, 38, 74, 81, 82, 104). Dr. Dabney testified that appellant was not capable of understanding the meaning and effect of the confession (Tr. Vol. II, p. 105). While Dr. Dabney stated further that the confession in his opinion was involuntary (Tr. Vol. II, p. 104), Dr. Ross was unable to form an opinion as to whether the confession in 1962 had been voluntary (Tr. Vol. II, pp. 7, 89, 90). But, Dr. Ross did testify that appellant did not understand the full implications of what he was doing when he confessed (Tr. Vol. II, pp. 7, 14, 26, 27, 71, 73, 74, 75, 76, 77, 82, 83, 89), and that appellant is presently mentally ill and a danger to himself and to society (Tr. Vol. II, pp. 79-80).

Appellant read into the record on the remand

hearing portions of the testimony given at the previous trial wherein appellant's wife testified that appellant had told her quite a few times that he had seen God and had seen his dead grandmother and that on occasions some unknown force held him down in bed and he felt he could not move (Tr. Vol. Excerpts, pp. 94-95). Appellant's wife also testified that appellant felt that his family was against him (Tr. Vol. Excerpts, p. 96). Appellant's mother had testified that appellant told her he had seen God and she stated that in her opinion he was mentally sick (Tr. Vol. Excerpts, pp. 107-109).

Appellant also read into evidence a written report by Dr. Read, a psychiatrist at St. Elizabeths Hospital, dated January 21, 1961, which stated that appellant had no particular insight into his personality and that his judgment was impaired (Tr. Vol. Excerpts Supplemental, pp. 115-119). Appellant also read into evidence a medical staff conference report dated February 20, 1961, which report stated: "Psychological tests on this patient give him an I.Q. of 72 (above moron, but very low grade of intelligence). He is described as an anxious, frightened man of inferior intelligence with little control over his impulses who tends to project his own inadequacies and fears onto the world outside." (Tr. Vol. Excerpts Supplemental, pp. 119-121).

Appellant also read into evidence a supplementary summary dated April 10, 1961, written by Dr. Read which stated that appellant showed no evidence of insight and appellant's judgment was still impaired (Tr. Vol. Excerpts Supplemental, pp. 124-125).

Appellant also introduced and read into evidence a hospital interval note prepared by Dr. Glenn D. Legler, a medical officer (psychiatry) at St. Elizabeths Hospital. The patient had been interviewed by Dr. Legler on November 26, 1962, approximately three months after the commission of the robbery and the subsequent confession. In his report of November 30, 1962, Dr. Legler stated that appellant said that no one paid any attention to him until he went through a hole in the fence. Concerning the offense, appellant stated to Dr. Legler that he went into a store, but that he did nothing wrong, because he did not hurt anyone. Appellant also stated to Dr. Legler that he had a feeling like he was two people and that beginning about a month before the offense of August 9, 1962, he would feel like he was paralyzed while trying to sleep and that he saw an empty chair rocking in his room. Appellant also said to Dr. Legler when asked who was rocking in the chair that he once had a grandmother who loved him. In response to a question why appellant forced people to lie

down at gun point appellant answered that since people force him to do things, he was going to force someone under his will also. Dr. Legler further noted that appellant had a history of auditory and visual hallucinations during his hospitalization in the month preceding the August 9, 1962, offense (Tr. Vol. IV, pp. 141-142; Tr. Vol. Excerpts Supplemental, pp. 126, 127, 139-141).

Appellant also read into evidence a psychological summary dated January 4, 1963, only five months after the confession was given. The report stated that "the current protocol was generally consistent with results obtained in 1961 in reflecting an anxious, frightened man of inferior intelligence, who has little control over his impulses and who projects onto the outside world his own inadequacies and fears." (Tr. Vol. Excerpts Supplemental, pp. 124-125).

Appellant and appellee stipulated that appellant was transferred from jail to St. Elizabeths Hospital on February 18, 1964, that such transfer was under the advice of the jail psychiatrist, who reported that appellant had been hallucinating, that appellant thought people were against him, that someone was transmitting gas into his chamber and that appellant was stuffing up pipes in his cell and hearing voices (Tr. Vol. Excerpts, p. 127).

Finally, appellant read into evidence a

psychological summary dated November 7, 1964, signed by John F. Borriello, Staff Psychologist at St. Elizabeths Hospital, which stated that appellant had little control over his impulses and that he still projects onto the outside world his own inadequacies and fears. (Tr. Vol. Excerpts Supplemental, pp. 127-128). All of the records of St. Elizabeths on appellant which were read into evidence are consistent with appellant's contention that when appellant confessed he did not understand the meaning or effect and the implications of said confession.

All psychiatrists called by the Government testified that, in their opinion, appellant's mental disease was in remission at the time he confessed (Tr. Vol. IV, pp. 89, 90, 152; Tr. Vol. V, p. 201). Neither Dr. Klinger nor Dr. Platkin was asked by the attorney for appellee any question as to whether appellant had the capacity to understand the meaning and effect of his confession. Only one psychiatrist called by the Government, Dr. Owens, testified as to whether or not appellant had the capacity to understand the meaning and effect of his confession. None of the questions asked by counsel for appellee dealt with any proper standard for determining voluntariness. Counsel for appellant objected to a question asked by counsel for appellee, i.e., whether

appellant had the "mental capacity to make a voluntary confession", and stated that the true test in determining whether or not a confession is voluntary when insanity is urged as a defense is whether appellant was capable of understanding the meaning and effect and implications of his confession (Tr. Vol. V, p. 208). The trial court sustained the objection and thereafter Dr. Owens testified that appellant understood the meaning and effect of his confession and then stated that appellant had the mental capacity to make a voluntary statement (Tr. Vol V, pp. 208-210).

Dr. Platkin, on cross-examination, conceded that he had in March of 1961, in Cr. No. 891-60, testified that appellant was suffering from a mental disease (Tr. Vol. IV, pp. 158, 159). Dr. Platkin testified on cross-examination that appellant's capacity to exercise restraint over his desires was impaired and that he lacked good judgment (Tr. Vol. IV, p. 159). Dr. Platkin testified that this led him to commit the crimes in Cr. No. 891-60 for which appellant was found not guilty by reason of insanity. Dr. Platkin testified that upon looking at the case retrospectively he was inclined to believe that appellant's symptoms were malingered and self-serving and he wondered whether appellant had ever been mentally ill (Tr. Vol. IV, pp. 142, 175-176).

As indicated by the Court's questioning of Dr. Platkin (Tr. Vol. IV, p. 178) and its ruling (Ruling of the Court, pp. 7, 8), in determining whether or not the confession used against appellant was voluntary, the Court decided this question: "Did appellant have the mental capacity to make a voluntary confession?" The Court answered this question affirmatively and on June 6, 1966, Judge Pine entered an order finding that the confession used against appellant at his trial was a voluntary confession. From the above order, appellant has appealed to this Court.

CONSTITUTIONAL PROVISION INVOLVED

1. U. S. Const. Amend. V:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

STATUTES INVOLVED

1. Act of June 29, 1940, C. 445, 54 Stat. 688, U.S.C.A., Title 18, Rule 5(a) of the Federal Rules of Criminal Procedure:

> "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

2. Act of June 29, 1940, C. 445, 54 Stat. 688, U.S.C.A., Title 18, Rule 52(b) of the Federal Rules of Criminal Procedure:

> "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

The Court below erred in. . .

1. Ruling that the standard to be used in determining the voluntariness of a confession when insanity is used as a defense to voluntariness is whether or not appellant had the mental capacity to make a voluntary confession.

> With respect to Point 1 (argued at pages 29-34, infra), appellant invites the Court's attention to the following pages of the reporter's transcript of the hearing on remand: Tr. Vol. I, pp. 7, 14, 26-27, 37, 74-83, 104-105; Tr. Vol. IV, pp. 89-90, 152, 178-179, 210; Tr. Vol. Ruling of the Court, pp. 7-8.

2. Finding that the Government had proven beyond a reasonable doubt that the confession used against appellant at trial was voluntary.

> With respect to Point 2 (argued at pages 34-37, infra), appellant invites the Court's attention to the following pages of the reporter's transcript of the hearing on remand: Tr. Vol. I, pp. 4, 5, 22; Tr. Vol. Ruling of the Court, p. 11; Tr. Vol. Excerpts, pp. 1-24, 94-96, 107-109; Tr. Vol. II, pp. 7, 14, 26-27, 71, 73-83, 89-90, 104-105; Tr. Vol. Excerpts Supplemental, pp. 115-121, 124-128, 139-141.

3. Failing to find that the confession used against appellant at trial was obtained after an "unnecessary delay" in arraignment in violation of Rule 5(a) of the Federal Rules of Criminal Procedure.

With respect to Point 3 (argued at pages 37-43, infra), appellant invites the Court's attention to the following pages of the reporter's transcript of the hearing on remand: Tr. Vol. I, pp. 4-6, 8, 18, 22, 26-27, 29-32, 34-37, 41-44, 52-53, 65, 82; Tr. Vol. V, pp. 241, 271, 276-278, 282; Tr. Vol. Excerpts, pp. 1-24; Tr. Vol. Excerpts Supplemental, pp. 136-138.

4. The holding of the United States Supreme Court in Pate v. Robinson, 383 U.S. 375 (1966) overrules Green v. United States, 122 U.S. App. D.C. 33, 351 F.2d 198 (1965), and appellant is entitled to a new trial.

With respect to Point 4 (argued at pages 43-50, infra), appellant invites the Court's attention to the following pages of the reporter's transcript of the hearing on remand: Tr. Vol. II, pp. 7, 14, 26-27, 71, 73-83, 89-90, 104-105; Tr. Vol. Excerpts, pp. 94-96, 107-109; Tr. Vol. Excerpts Supplemental, pp. 115-121, 124-128, 139-141. Appellant further invites this Court's attention to the docket entries in Cr. No. 799-62 insofar as they relate to appellant's contention that no order was entered adjudicating appellant to be competent to stand trial. Appellant further invites this Court to take judicial notice of the facts in Appeal No. 17,841 and No. 18,176 insofar as they relate to the past medical history of appellant.

SUMMARY OF ARGUMENT

I.

The proper standard to be used in determining the voluntariness of a confession when insanity is urged as a defense to voluntariness is whether the appellant, at the time he confessed, was capable of "understanding the meaning and effect of his confession." People v. Tipton, 48 Cal.2d 389, 394, 309 P.2d 813, 817 (1957), cert. denied, 355 U.S. 846 (1958).

The evidence adduced at the hearing on remand conclusively shows that appellant was not capable of understanding the meaning and effect of the confession. Only one psychiatrist called by the Government testified that appellant had the mental capacity to make a voluntary confession. The attorney for the Government failed to ask any questions of her psychiatrists as to whether appellant was capable of understanding the meaning and effect of his confession. Judge Pine ruled that appellant had the mental capacity to make a voluntary confession.

The evidence shows that appellant has suffered from a mental disease from at least 1960 to the present date, i.e., schizophrenic reaction, chronic undifferentiated type with paranoid features. The only issue on which the psychiatrists have differed is whether at the

time of the alleged offenses and confession appellant's mental disease was in remission.

Case law indicates that no courts have followed the standard adopted by Judge Pine in determining voluntariness, i.e., mental capacity to make a voluntary confession. The majority of the courts that have ruled on this question have held that the proper test in determining voluntariness of a confession when insanity is urged as a defense is whether the accused is capable of understanding the meaning and effect of his confession. Anno. Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession, 69 ALR2d 348-357 (1960).

Our law dictates that a confession is inadmissible in evidence when it is procured without full knowledge by the accused of what he is doing when he makes such a confession. United States v. Maroney, 247 F.Supp. 767, 779 (W.D.Pa. 1965). Therefore, this Court must hold the confession to be involuntary as a matter of law and reverse for a new trial, or in the alternative, hold that Judge Pine adopted the wrong test in determining voluntariness of a confession when insanity is urged as a defense, and remand this case for a hearing on the voluntariness of the confession with proper guidelines as to the test to be followed by the trial court.

II.

In the instant case appellant was not warned of his right to counsel and he was not properly warned of his right to remain silent. Although Johnson v. State of New Jersey, 384 U.S. 719 (1966), precludes this Court from applying the principles of Miranda v. Arizona, 384 U.S. 436 (1966), retroactively, case law on coerced confession is available for persons whose trials have already been completed. This Court is thus free to consider the fact that appellant did not receive proper "warnings" in the instant case in determining the voluntariness of the confession.

Davis v. State of North Carolina, 384 U.S. 737 (1966) teaches us that the failure to give an accused advice as to his right to an attorney and his right to remain silent is a significant factor in considering the voluntariness of statements later made. The thesis of Davis and earlier cases is the same: That, to be admissible, a confession must be "the product of an essentially free and unconstrained choice." This Court must hold that, based on the facts surrounding the confession and the past medical history of appellant as set forth in the Statement of Facts, the confession was involuntary as a matter of law.

III.

The facts brought out on the remand of this case clearly show that the confession introduced at the trial against appellant was obtained after an "unnecessary delay" in arraignment in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. The facts show that appellant was arrested with the stolen money and he was carrying the gun used in the robbery. Instead of taking appellant to a magistrate or U. S. commissioner the police took appellant to the scene of the robbery where he was positively identified by the holdup victims. Instead of taking appellant to a magistrate or a U. S. commissioner appellant was taken back to the Fifth Precinct where he was "grilled" and there he ultimately confessed. Since the police detained appellant after his arrest until he confessed and only then, when any judicial caution had lost its purpose, arraigned him, the confession is inadmissible. Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964).

Although appellant did not move in the trial court to suppress evidence on the ground of a 5(a) violation, there was a motion to suppress on grounds of involuntariness. Furthermore, Judge Pine took testimony at the hearing on remand on this issue and a Mallory violation was clearly proven. Therefore, this Court should hold that the confession

by appellant was given after a delay was used by the police for obtaining the confession in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, and reverse for a new trial.

IV.

It is unconstitutional to put a man to trial and convict him unless he is competent to stand trial. Pate v. Robinson, 383 U.S. 375 (1966). The determination whether a defendant is competent must be a judicial determination and adequeate procedures must be provided for making the determination. Holloway v. United States, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964).

In the instant case appellant's past medical record from 1960 to 1966 shows conclusively that appellant has been and currently is suffering from a severe mental illness, namely, schizophrenic reaction, chronic undifferentiated type, with paranoid features. In Powell v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (decided December 28, 1966), this Court stressed two factors that were present in the instant case that would require a trial judge, sua sponte, to order a judicial hearing on competency to stand trial. These two factors are: (1) A long history of mental illness to create a doubt of Green's competency to stand trial; and (2) an adjudication of insanity in

Cr. No. 891-60 which was still in effect when appellant was placed on trial in Cr. No. 799-62 in March of 1963.

Pate plainly holds that past history of mental illness, brought out at trial, must be considered by the trial court and that evidence raising a substantial doubt regarding competency imposes a constitutional duty on the trial court to conduct, on its own motion if the defendant fails to request it, an inquiry into the defendant's competence to stand trial. In the instant case, the trial court's failure to conduct, sua sponte, a judicial hearing on competency denied appellant a fair trial and the only appropriate remedy for this constitutional violation is a new trial. Pate v. Robinson, supra; Dusky v. United States, 362 U.S. 402 (1960).

ARGUMENT

I.

The Court Erred in Determining that the Standard to be Used in Deciding Voluntariness of a Confession when Insanity is Urged as a Defense to Voluntariness is Whether or Not the Accused had the Mental Capacity to Make a Voluntary Confession

The Court erred in ruling that the standard for determining voluntariness of a confession when insanity is used as a defense is whether or not appellant had the mental capacity to make a voluntary statement.

It is clear from the Court's findings of facts and conclusions of law that it judged voluntariness to make a confession by the test of whether or not the appellant had the mental capacity to make a voluntary confession. (Pages 7 and 8 of the Ruling of the Trial Court). It is respectfully submitted that the proper test to be used in determining voluntariness of a confession when insanity is urged as a defense to voluntariness is whether or not the appellant was capable of "understanding the meaning and effect of his confession." People v. Tipton, 48 Cal.2d 389, 394, 309 P.2d 813, 817 (1957), cert. denied, 355 U.S. 846 (1958). Under this test, if an accused's mental subnormality has deprived him of capacity to understand the meaning and effect of the confession, the confession would be inadmissible. People v. DeSimone, 66 Ill. App.2d 249, 214 NE2d 305 (1966).

Although there is dictum in McAffee v. United States, 72 App. D.C. 60, 111 F.2d 199 (1940) to the effect that in absence of total insanity, neither the voluntary character of a confession nor its admissibility is affected by the mental instability of the person making, this Court has never passed on the question of what is the standard to be followed in determining voluntariness when insanity is urged as a defense.

So far as this attorney's research indicates, there is no federal case decided which applies a standard to be used in determining voluntariness of a confession when insanity is urged as a defense to voluntariness. However, in Blackburn v. Alabama, 372 U.S. 528 (1963) the Court held that a conviction could not stand when it was based on the confession of a madman who had been institutionalized during the four years immediately prior to the crime and the interrogation. Though Blackburn's complete incompetence made his confession unreliable, forms of mental illness less incapacitating than his might be thought relevant to the determination of admissibility. For example, the studies of some psychologists suggest that many suspects may have an uncontrollable urge to admit guilt. See e.g., Alexander & Stark, The Criminal, The Judge and The Public, 94-95 (1956); Menninger, Man Against

Himself, 203 (1938). If this compulsion to confess is considered irrational, it would be unfair to question such people.

In the case at bar both the psychiatrists called by appellant testified that Lawrence Green, at the time he made the admissions in question, did not understand the full implication of what he was doing at the time he confessed (Tr. Vol. II, pp. 7, 26, 27, 37, 74, 81, 82, 104). Dr. Dabney further testified that appellant was not capable of understanding the meaning and effect of the confessions (Tr. Vol. II, p. 105). While Dr. Dabney testified that the confession was involuntary (Tr. Vol. II, p. 104), Dr. Ross was unable to state whether or not the confession was voluntary (Tr. Vol. II, p. 7). However, Dr. Ross did testify that appellant did not understand the full implications of what he was doing, when he confessed because appellant did not understand the nature of his own personal freedom, because of his low IQ of 72, and because appellant compulsively confesses (Tr. Vol. II, pp. 7, 14, 26, 27, 74, 75, 82, 83). Dr. Ross further testified that appellant is presently a danger to himself and to society (Tr. Vol. II, pp. 79-80).

On the other hand, only one psychiatrist called by the Government spoke in terms of whether or not the

appellant had the mental capacity to make a voluntary confession. Dr. Klinger merely stated that at the time the appellant made the statements he was not, in his opinion, suffering from a mental illness. (Tr. Vol. IV, pp. 89-90). Dr. Platkin testified to the same effect (Tr. Vol. IV, p. 152). Dr. Owens testified that appellant had the mental capacity to make a voluntary statement of his own free will (Tr. Vol. V, p. 210). It is clear from the Government attorney's own admission that she was unclear as to what test should be used by the Court in determining voluntariness when insanity is urged as a defense (Tr. Vol. IV, p. 179). At any rate, the Court adopted the test of "mental capacity to make a voluntary statement" as is indicated by the Court's questioning of Dr. Platkin (Tr. Vol. IV, p. 178) and his ruling (Pages 7 and 8 of the Ruling of the Trial Court). Judge Pine ruled that appellant had the mental capacity to make a voluntary statement despite the fact that two of the three Government-called psychiatrists were not even asked questions as to the mental capacity of appellant to make a confession.

It is submitted that the test adopted by Judge Pine - mental capacity to make a voluntary statement - is not helpful in deciding the issue when insanity is used as a defense to voluntariness. Not one court in the

United States has adopted such a test, while the majority of courts that have ruled on the question have held that the proper test is whether or not the accused is capable of understanding the meaning and effect of his confession. Anno. Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession, 69 ALR2d 348-357 (1960). Since appellant had a low mentality (IQ of 72) he could not understand the implications or the meaning and effect of his confession and it was involuntary. For our law makes inadmissible in evidence any confession by an accused when it is procured without full knowledge by the accused of what he is doing when he makes such a confession. Townsend v. Sain, 372 U.S. 293 (1963); Reck v. Pate, 367 U.S. 433 (1961); United States v. Maroney, 247 F.Supp. 767, 779 (W.D. Pa. 1965). Therefore, this Court must hold the confession to be involuntary as a matter of law and reverse for a new trial, or in the alternative, hold that Judge Pine adopted the wrong test in determining voluntariness of a confession when insanity is urged as a defense, and remand this case for a hearing on the voluntariness of the confession with proper guidelines as to the test to be followed by the trial court.

II.

The Confession Introduced at the Trial Against Appellant Was Involuntary Under Traditional Tests of Voluntariness that were in Effect at the Time of the Hearing on Remand

Subsequent to the District Court's decision on remand in the case at bar, the Supreme Court decided Miranda v. State of Arizona, 384 U.S. 436 (1966) and Johnson v. State of New Jersey, 384 U.S. 719 (1966). Miranda established standards for in-custody interrogations, among which are: Prior to any questioning, the person must be advised that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. Johnson precludes this Court from applying the principles of Miranda retroactively in judging the admissibility of appellant's confession. The Supreme Court concluded that their holdings in the two cases should not be applied retroactively but should apply only to cases commenced after the decision was announced.

But the Court emphasized that even though Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda were to be given only prospective application, case law on coerced confessions is available for persons whose trials have already been completed. Thus the Johnson decision

does not preclude persons from invoking the safeguards established in Escobedo and Miranda as part of an involuntariness claim. See Holman v. Washington, 364 F.2d 618, 621 (5th Cir. 1966). The failure of the police to meet these standards would be one factor to be considered by the Court in determining whether the resulting confession was involuntary. For the substantive test of the voluntariness of a confession takes account of a failure to advise an accused properly of his privilege against self-incrimination or to allow him access to outside assistance. McGarrity v. Wilson, 368 F.2d 677 (9th Cir. 1966).

In the instant case it is undisputed that appellant was not advised of his right to counsel. Furthermore, appellant was not properly warned of his right to remain silent. Appellant was advised that he did not have to make any statements and that any statements made could be used in his behalf or used against him at trial in court. At least one state has held that such a warning is inadequate and that a confession is not admissible in evidence if police warned a defendant that it may be used for him, regardless of the fact that the defendant was warned that the confession might be used against him. See White v. State, 163 Tex. Cr. R. 77, 289 S.W.2d 279 (1956); White v. Beto, 367 F.2d 557 (5th Cir. 1966).

Psychiatric testimony brought out by appellant and the records show the following: Appellant has a sixth grade education, his IQ is near 72, that he does not understand the nature of his own personal freedom, and that he compulsively confesses. This led both Dr. Ross and Dr. Dabney to conclude that appellant did not understand the full implication of what he was doing when he confessed and that he was not capable of understanding the meaning and effect of his confession. The past medical history of appellant, as described in the Statement of Facts herein, conclusively demonstrates that appellant has been mentally ill from 1960 to the present date.

Davis v. State of North Carolina, 384 U.S. 737 (1966) teaches us that the fact that a defendant is not effectively warned of his right to remain silent or of his right to counsel at the outset of interrogation, is a significant factor in considering the voluntariness of statements later made. The thesis of Davis and Haynes v. State of Washington, 373 U.S. 503 (1963) and Culombe v. Connecticut, 367 U.S. 568 (1961) and the very recent case of Smallwood v. Warden, Maryland Penitentiary, 367 F.2d 945 (4th Cir. 1966), is the same: that, to be admissible, a confession must be "the product of an essentially free and unconstrained choice." Since our law makes inadmissible

in evidence any confession by an accused when it is procured without full knowledge by the accused of what he is doing when he makes such a confession, United States v. Maroney, 247 F.Supp. 767, 779 (W.D.Pa. 1965), this Court must hold that, based on the facts surrounding the confession and the past medical history of appellant, the confession given by appellant was involuntary as a matter of law and this Court should reverse the lower court's finding of voluntariness[1] and grant a new trial.

III.

The Court Erred in Denying Appellant's Motion for a Directed Verdict at the Hearing on Remand When the Confession Introduced at Trial Against Appellant was Obtained after an "Unnecessary Delay" in Arraignment in Violation of Rule 5(a) of the Federal Rules of Criminal Procedure

The facts brought out on the remand of this case clearly show that the confession introduced at the trial against appellant was obtained after an "unnecessary delay" in arraignment in violation of Rule 5(a) of the Federal

---

1. The lower court adopted the "beyond a reasonable doubt" standard, as set forth in United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965), in determining the voluntariness of the confession (Ruling of the Court, p. 5). Recently, this Court has held that a judge must find only that on all the evidence he is satisfied that the confession was voluntary before he allows the confession to go to the jury. Clifton v. United States, ____ U.S. App. D.C. ____, 371 F.2d 354 (1966).

Rules of Criminal Procedure. Appellant was arrested near the Fifth Precinct and he was carrying the toy gun used in the robbery. Appellant was caught with a brown paper bag containing the money stolen from the Blumer Realty Company.

Instead of taking appellant to a U. S. Commissioner without unnecessary delay, as the police were duty-bound to do, appellant was taken to the scene of the holdup for identification. At the Blumer Realty Company the appellant was identified by the employees as being the robber and the employees also identified the money found on appellant at the time he was arrested as being the money stolen.

After the identification of appellant at the scene of the robbery, the police still did not take appellant to a U. S. Commissioner. Instead, appellant was returned to the Fifth Precinct where he was taken to a room on the second floor where he was interrogated by Detective Barnes and Officer Keahor. Appellant was also faced with the presence of Carol Fargo, one of the persons he held up at the Blumer Realty Company. It was under these circumstances that appellant made the confession which was used against him at the trial of the instant case.

Appellant moved for a directed verdict on the remand hearing on voluntariness of the confession on the

grounds that there was a violation of Rule 5(a) of the Federal Rules of Criminal Procedure, that appellant had not been advised of his right to counsel and that, therefore, the confession was inadmissible as a matter of law. The motion was denied.

It is respectfully submitted that the learned trial judge erred as a matter of law in not finding that the confession was obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure.

Rule 5(a) of the Federal Rules of Criminal Procedure requires an officer making an arrest to "take the arrested person without unnecessary delay before the nearest available" committing magistrate. Although the rule does not itself specify sanctions for its violations, the Supreme Court has held that a confession obtained after an "unnecessary delay" in arraignment is inadmissible in a federal prosecution. This exclusionary rule was first announced in McNabb v. United States, 318 U.S. 332 (1943). Mallory v. United States, 354 U.S. 449 (1957), decided fourteen years after McNabb, established that any confession obtained during an unnecessary delay in arraignment is inadmissible. The major unresolved question under McNabb is the extent to which 5(a) permits arraignment to be delayed for the purpose of interrogation.

This Court has consistently held that until an accused has been advised of his rights and has been accorded the additional protections the law provides, criminal convictions are to be based on evidence produced by proper police investigation and not out of the mouth of the accused. Naples v. United States, 113 U.S. App. D.C. 281, 307 F.2d 618 (1962); Jones v. United States, 113 U.S. App. D.C. 256, 307 F.2d 397 (1962); Williams v. United States, 113 U.S. App. D.C. 7, 303 F.2d 772 (1962). And in Spriggs v. United States, 118 U.S. App. D.C. 248, 335 F.2d 283 (1964), this Court stressed that time is not decisive and any confession must be excluded if any of the delay is used for the purpose of obtaining a confession. See also Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964).

If the police detain an accused after his arrest until he has confessed and only then, when any judicial caution has lost its purpose, arraign him, the confession is inadmissible no matter how much, or how little, time was required to obtain it. Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964). The instant case is similar to United States v. Middleton, 344 F.2d 78 (2d Cir. 1965) where the Court held that the detention of an accused without arraignment to obtain a flat admission

that he had stolen a calculating machine was unreasonable, and the admission of incriminating evidence obtained during an unreasonable delay in arraignment was reversible error, where continued interrogation was an attempt to make an airtight case ironclad by extracting a confession. In the instant case the confession was obtained after an "unreasonable delay" in arraignment for the purpose of making an airtight case ironclad.

Although appellant did not move to suppress evidence in the trial court on Mallory grounds, there was a motion to suppress evidence on the grounds that the confession was involuntary. Furthermore, on the remand hearing Judge Pine took additional evidence and the Mallory issue was clearly before him. This Court has held that motions to suppress have been sufficient even if on the wrong grounds and it has been held that under Rule 52(b) of the Federal Rules of Criminal Procedure this Court can pass on issues even in absence of any objections if plain errors affecting substantial rights are involved and if a violation is clear from the record. Smith v. United States, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964); Williams v. United States, 105 U.S. App. D.C. 41, 263 F.2d 487 (1959). From a cursory glance of the record in the instant case it is clear that there was a violation of Rule 5(a) of the

Federal Rules of Criminal Procedure and the admission of the confession substantially prejudiced appellant.

It is stated in Note, Developments in the Law--Confessions, 79 Harv. L. Rev. 935, 987 (1966), that the McNabb doctrine and Mallory deal with voluntariness of a confession since a lengthy delay in arraignment in order to permit questioning is itself an intimidating factor and failure to provide access to 5(b) magistrate's warnings may prolong an accused's ignorance of his constitutional rights, both being factors tending to render a confession involuntary. The Note concludes that the Court in McNabb and Mallory may have believed that a substantial percentage of "voluntary" confessions obtained during delays in arraignment were in fact involuntary, and that a per se exclusionary rule was therefore desirable. 79 Harv. L. Rev. 935, 987 (1966).

Although there is language in Coor v. United States, 119 U.S. App. D.C. 259, 340 F.2d 984 (1964) that the Mallory issue has nothing to do with the voluntariness of a confession, that case held nothing more than that the failure to raise the issue of voluntariness at trial combined with no showing on the record of involuntariness meant that Rule 52(b) of the Federal Rules of Criminal Procedure would not be involved. In Coor, the case had

been remanded to the District Court for a hearing on the Mallory issue and counsel attempted to raise, for the first time, a question as to the voluntariness of the confession. There had been no motion to suppress evidence at the trial of the Coor case. The trial court refused to consider evidence on the voluntariness of the confession. However, in the instant case appellant moved at the trial to suppress the confession and on the remand, where Judge Pine held a full evidentiary hearing, appellant raised the Mallory issue and the trial judge allowed evidence to be introduced on the Mallory issue. The evidence introduced made it clear that there is a Mallory violation. Under these circumstances, the Coor case is inapplicable to the case at bar and this Court should hold, as a matter of law, that there is a violation of Rule 5(a) of the Federal Rules of Criminal Procedure and that appellant is entitled to a new trial.

IV.

The Holding of the Supreme Court in Pate v. Robinson, 383 U.S. 375 (1966) Overrules the Cases of Whalem v. United States, 120 U.S. App. D.C. 331, 346 F.2d 812, Cert. Denied, 382 U.S. 862 (1965) and Green v. United States, 122 U.S. App. D.C. 33, 351 F.2d 198 (1965) and Appellant is Entitled to a New Trial

This appeal being properly before this Court on review of Judge Pine's finding that the confession used

against appellant was voluntary, this Court has jurisdiction to reconsider all of the questions determined in the earlier stages of the litigation. Reece v. Georgia, 350 U.S. 85 (1955). Since this Court has power to reverse an earlier determination of an issue on appeal, Christoffel v. United States, 94 U.S. App. D.C. 168, 214 F.2d 265 (1954), and has the power to recall its judgment from the District Court and reverse a conviction, Byrd v. United States, No. 12,843 (order dated March 31, 1959), appellant is asking this Court to reconsider its decision in Green v. United States, 122 U.S. App. D.C. 33, 351 F.2d 198 (1965), in light of Pate v. Robinson, 384 U.S. 375 (1966). Therefore, appellant has briefed the issue of whether Pate overrules Green and appellant respectfully requests that this Court consider this point on the present appeal.

The majority of this Court, sitting en banc, in its opinion filed in the Green case, held that the Whalem case was controlling and that the trial judge herein was not required to hold a hearing on the issue of competency when appellant was certified competent to stand trial by St. Elizabeths Hospital and there was no objection to such certification by appellant's court-appointed attorney, which the Court held amounted to a waiver of appellant's right to a judicial hearing on competency to stand trial.

Subsequent to the Whalem and Green cases the Supreme Court decided Pate v. Robinson, 383 U.S. 375 (1966), in which the Court held evidence raising a substantial doubt regarding the defendant's competency to stand trial, i.e. a long history of mental illness, imposed a constitutional duty on the trial court to conduct, on its own motion if the defendant failed to request it, an inquiry into the defendant's competence to stand trial which could not be waived. In Pate v. Robinson, the defendant never requested a competency hearing and it was contended that he had waived his right to one. At trial, the defendant presented an insanity defense as in the Green case and produced several lay witnesses who testified to his various bizarre acts and irrational behavior. The "uncontradicted testimony of Robinson's history of pronounced irrational behavior", 383 U.S. 375, 385-86 (1966) and his long history of mental illness was enough for the Supreme Court to hold that the trial court's failure to conduct, sua sponte, an inquiry into defendant's competence denied him a "fair trial". In Pate, the Supreme Court said that a defendant's apparent alertness and understanding during trial cannot outweigh his long history of mental illness.

In both the Green and Whalem cases this Court has held that the conclusionary hospital report certifying the

defendants to be competent to stand trial was sufficient to bring the defendants to trial. This is so notwithstanding the fact that appellant in the instant case had suffered from severe mental illness in the past which was known to the trial judge prior to appellant's trial.

In the instant case appellant's past medical record from 1960-1966 is replete with periods of severe mental illness. Let us briefly review the facts. Appellant was committed to St. Elizabeths on April 10, 1961, after the District Court directed a verdict of not guilty by reason of insanity in Cr. No. 891-60. Appellant was still a patient in St. Elizabeths at the time the crimes were committed for which he was convicted in the court below but had managed to escape through a hole in the fence. Appellant had not recovered his sanity at the times the crimes were committed so as to be conditionally or unconditionally released pursuant to 24 D.C. Code Sect. 301(e). After his trial in Cr. No. 799-62, appellant was committed to St. Elizabeths Hospital. In August of 1963 the Court held a hearing in Cr. No. 891-60 and the Court held that appellant was fit to serve his sentence in jail and that he had recovered his sanity. After less than five months spent in jail, appellant was again sent back to St. Elizabeths in January, 1964, this time by prison officials

acting under Title 24 D. C. Code Sect. 302 because he was not considered fit to serve his sentence in jail. About a year later, in February of 1965, appellant was sent from St. Elizabeths to Lorton, Virginia, to continue serving his sentence in jail. Meanwhile, this Court in Green v. United States, 121 U.S. App. D.C. 226, 349 F.2d 203 (1965), reversed the holding of the District Court in Cr. No. 891-60 that he had recovered and was fit to serve his sentence. After appellant had been granted the right to a psychiatric examination from a doctor independent of St. Elizabeths Hospital, a court hearing was held in Cr. No. 891-60 and in February, 1966, Judge Curran entered an order denying the hospital's request of a release of appellant from St. Elizabeths. Presently, appellant is still at St. Elizabeths pursuant to his commitment under Title 24 D. C. Code Sect. 301(d) entered in 1961 in Cr. No. 891-60.

The foregoing facts readily demonstrate that appellant has been and still is suffering from a mental illness, namely, schizophrenic reaction, chronic undifferentiated type, with paranoid features. The certificate of competency, in conclusionary form, filed by the hospital officials in Cr. No. 799-62 in February, 1963, was some evidence of appellant's ability to assist in his

defense. But these facts could not properly have been deemed dispositive of the issue of Green's competence. No reasoning offers justification for ignoring the uncontradicted testimony given at the trial of this case, both lay and expert, of Green's history of pronounced mental illness.

This Court held in Green that by failing to object to the certificate of competency filed prior to the trial in the instant case appellant waived his right to a judicial hearing on competency to stand trial. Because we are dealing by hypothesis with a defendant who may be incompetent, the usual proposition that rights may be lost by waiver has little to do with the problem posed. Thus the fact of there being no request for a judicial hearing on competency is by no means controlling. See Pate v. Robinson, supra at 384; id at 388 (Harlan, J. dissenting), ("Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers.")

Pate holds that past history of mental illness, brought out at trial, must be considered by the trial court and that evidence raising a substantial doubt regarding competency imposes a constitutional duty on the trial court to conduct, on its own motion if the defendant fails to request it, an inquiry into the defendant's

competence to stand trial. In the instant case, knowledge of appellant's past medical background and his prior commitment to St. Elizabeths Hospital was brought home to the Court by appellant's pretrial motion to dismiss the indictment which was denied, by the motion to suppress the confession during the trial, by the record before the Court in Cr. No. 891-60 and by the lay and expert testimony bearing on sanity given at the trial in Cr. No. 799-62. The Court below knew long before the trial appellant's past medical record and that appellant's sole defense would be insanity.

In Powell v. United States, ____ U.S. App. D.C. ____, ____ F.2d _____ (decided December 28, 1966), this Court stressed two factors that were present in the instant case that would require a trial judge, sua sponte, to order a judicial hearing on competency to stand trial. In Powell, in affirming the trial judge's failure to hold a hearing on competency to stand trial there was no evidence of a long record of disturbed behavior such as to create a doubt of Powell's competence to stand trial and Powell had never been adjudged to be of unsound mind. By contrast, in the instant case appellant's medical history from 1960 to the present date is replete with periods of severe mental illness and appellant has been

adjudged to be of unsound mind in Cr. No. 891-60, an adjudication which was still in force when appellant was put on trial in the instant case.

Pate plainly holds that the trial court has a constitutional duty to conduct, sua sponte, an inquiry into a defendant's competency to stand trial in circumstances that are similar to those in the case at bar. The trial court's failure to conduct, sua sponte, a judicial hearing on competency denied appellant a fair trial and the only appropriate remedy for this constitutional violation is a new trial. See, e.g. Pate v. Robinson, 383 U.S. 375, 386-87 (1966); Dusky v. United States, 362 U.S. 402 (1960); Hansford v. United States, ____ U.S. App. D.C. ____, 365 F.2d 920 (1966); Holloway v. United States, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964).

CONCLUSION

For the reasons set forth herein, the order entered by the trial court should be reversed and a new trial granted appellant.

Respectfully submitted,

Arthur G. Lambert

ARTHUR G. LAMBERT
Attorney for Appellant
(By Appointment of This Court)
200 Davis Building
1629 K Street, N. W.
Washington, D. C. 20006

REPLY BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,288

Lawrence W. Green,

Appellant,

v.

United States of America,

Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR G. LAMBERT
(By Appointment of This Court)
FRED WARREN BENNETT
200 Davis Building
1629 K Street, N. W.
Washington, D. C. 20006

Attorneys for Appellant

TABLE OF CONTENTS

INDEX TO CITATIONS

*These cases were reported in Shepard's United States Supreme Court Reporter Citations after counsel for appellant prepared and filed their original brief.

ARGUMENT

I.

The Court's Ruling That "Mental Capacity to Make a Voluntary Statement" Was the Proper Standard to Be Used in Determining Voluntariness of a Confession When Insanity Is Urged As a Defense to Voluntariness Was Erroneous

Appellee, instead of discussing the first issue raised by appellant in his brief,[1] states that the credible evidence adduced at the remand hearing convinced the judge beyond a reasonable doubt that appellant had the mental capacity . . . to voluntarily confess.[2] However, appellee seems to concede that the standard articulated in People v. Tipton, 48 Cal.2d 389, 309 P.2d 813 (1957), cert. denied, 355 U.S. 846 (1958), is the proper standard to be used in determining voluntariness of a confession.[3] Under the People v. Tipton standard, when insanity is urged as a defense to voluntariness of a confession, a confession is not voluntary unless the accused is capable of understanding the meaning and effect of the confession.

It is clear that the trial judge determined voluntariness based on the standard "mental capacity to make a voluntary statement" (Ruling of the Court, pp. 7-8). Instead of arguing

---

1. Appellant's Brief, pp. 29-33.
2. Appellee's Brief, p. 11.
3. Appellee's Brief, p. 16, n. 15.

that the proper standard is the one that was adopted by the trial judge, appellee merely states that the testimony considered by the trial judge satisfied the standard enunciated in People v. Tipton. Thus, appellee would have this court hold that although the trial judge erroneously adopted the wrong standard in determining voluntariness, the evidence before the trial judge would have allowed him to find the confession to be voluntary if he had adopted the proper standard as stated in People v. Tipton.

Counsel for appellant argued throughout the remand hearing that the proper test to be used in determining voluntariness of a confession when insanity is urged as a defense to voluntariness is whether or not appellant was capable of understanding the meaning and effect of his confession (Tr. Excerpts Supplemental, pp. 176-77). Appellant earnestly submits that the trial judge adopted the wrong standard in determining voluntariness and a new remand hearing is the only alternative to granting appellant a new trial. At such remand hearing the trial judge should determine voluntariness based on the standard laid down in People v. Tipton.

evidence by appellant (Tr. Vol. Excerpts--Supplemental, pp. 136-139), make it unmistakenly clear that the confession made by appellant was obtained back at the Fifth Precinct and not at the scene of the robbery. Appellant plans on filing the above-mentioned exhibits with the Clerk's Office of the United States District Court for the District of Columbia so that said exhibits can be certified and transmitted to this court as part of the Record on Appeal.

Since the confession was obtained from appellant after an "unnecessary delay" in arraignment and was not a "spontaneous" or "threshold" utterance and since the Mallory issue was before the trial judge and was considered by him, this court should hold that there was a violation of the Mallory rule and reverse for a new trial.[6]

---

6. Appellant's Brief, pp. 37-43.

III.

The Holding in Pate v. Robinson, 383 U.S. 375 (1966), Requires This Court to Vacate Its Prior En Banc Decision in This Case and Grant Appellant a New Trial

Appellee would have this court believe that the holding in Whalem v. United States, 120 U.S. App. D.C. 331, 346 F.2d 812 (en banc), cert. denied, 382 U.S. 862 (1965), and the prior en banc decision in this case have not been affected by Pate v. Robinson. Appellee suggests that the Pate v. Robinson opinion simply paraphrases the law followed in this jurisdiction at the time that Green and Whalem were decided.

Appellant earnestly submits that Whalem v. United States and this case must be reconsidered in light of Pate v. Robinson and that appellant is entitled to a new trial because the trial court erred in failing to conduct a sua sponte hearing into appellant's competence to stand trial.

This court, in Whalem v. United States held that a trial judge is not bound to hold a hearing on the issue of competency when an accused is certified to be competent to stand trial and there is no objection to such certification. Whalem v. United States, 120 U.S. App. D. C. at 335, 346 F.2d at 816. In this case, the majority of this court held that Whalem v. United States was controlling and that in the absence of an objection

to the certificate of competency the court could proceed to trial without a judicial determination of competency.

This court, in Hansford v. United States, _____ U.S. App. D.C. _____, 365 F.2d 920, 925, n. 14 (1966), has stated that Pate v. Robinson casts grave doubts on the validity of Whalem. Appellant submits that implicit in the holding of Pate v. Robinson is a rejection of the view held by the majority of this court in Whalem and this case that the failure to object to a certificate of competency is a waiver of the accused's right to a judicial hearing on competency to stand trial. Although the majority of this court in Whalem and this case did not speak in terms of waiver, it is clear from a reading of the opinions that the failure to object to the certificate of competency was construed to be a "waiver" of the accused's right to a judicial hearing on competency. However, the reasoning of Pate v. Robinson dictates that the fact that appellant did not object to the certificate of competency in the instant case is of little importance in deciding whether or not appellant was entitled to a judicial hearing on competency.

Appellant submits that the recent case of Krause v. Fogliani, _____ Nev. _____, 421 P.2d 949 (1966), is applicable in the case at bar. In Krause, the defendant was serving a

robbery sentence in prison when he became mentally ill and was transferred to the Nevada State Hospital. Ten days later he escaped and three days later a kidnapping occurred and the defendant was charged with committing the crime. The defendant pled guilty to the charge and the judge who took the plea knew that defendant was an escapee from a mental institution. On appeal from a denial of release on a habeas corpus petition it was held that the defendant was denied due process of law since the judge was required, sua sponte, to order a hearing to determine the competency of the defendant before accepting a plea of guilty and that the defendant did not "waive" his right to a competency hearing by failing to request one. Likewise, in the case at bar, appellant was an escapee from a mental institution and that fact, and the past medical history of appellant was before the court in Cr. No. 799-62. The holding in Krause v. Fogliani, as applied to the case at bar, indicates that the fact that appellant was an escapee from St. Elizabeths would require the trial judge to sua sponte order a judicial determination of competency.

Furthermore, the holding in Pate v. Robinson seems to have brought changes in other circuits in dealing with the problem of the procedure to be followed under 18 U.S.C., § 4244,

which, like 24 D. C. Code, § 301(a) contains no express prescription for the court to follow when a mental examination results in a certificate of competency. The case of Floyd v. United States, 365 F.2d 368 (5th Cir. 1966) contains strong language that a § 4244 psychiatric report which indicates a state of present competency to stand trial is not sufficient to put a man on trial without a judicial hearing on competency if the court has knowledge that the accused has suffered from a serious mental illness prior to trial. In Floyd, the court held that the trial judge erred in holding that a medical report which stated that defendant was competent to stand trial conclusively showed that defendant was entitled to no relief in an 18 U.S.C., § 2255, proceeding and remanded the case to the District Court for a full evidentiary hearing on defendant's claim that he was incompetent when he entered a guilty plea. As in Floyd v. United States, in the instant case, the report[7] filed by St. Elizabeths put the trial court on notice that appellant was an escapee from St. Elizabeths and that he

---

7. The records show that a copy of the report was mailed to George A. Pope, Esq., who did not even represent appellant at trial in Cr. No. 799-62; therefore, since neither appellant nor his counsel ever received a copy of the report, it can hardly be argued that appellant waived his right to a judicial hearing on competency by failing to object to the report.

suffered from a mental illness, Schizophrenic Reaction, Chronic Undifferentiated Type (In Remission).

Based on the report filed in this case, the pretrial motions in this case raising the issue of insanity and incompetency and the record before the court in Cr. No. 891-60 which contained information on appellant's past mental illness, the court should have sua sponte granted a judicial hearing on competency to stand trial. The failure to conduct such a hearing denied appellant a fair trial and the only appropriate remedy for this constitutional violation is a new trial. Pate v. Robinson, 383 U.S. 375, 386-87 (1966).

CONCLUSION

For the reasons set forth in appellant's brief and herein, the order entered by the trial court should be reversed and a new trial granted appellant.

Respectfully submitted,

ARTHUR G. LAMBERT
(By Appointment of This Court)
FRED WARREN BENNETT
200 Davis Building
1629 K Street, N. W.
Washington, D. C. 20006

Attorneys for Appellant

16

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,288

LAWRENCE W. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
CAROL GARFIEL,
LEE A. FREEMAN, JR.,
Assistant United States Attorneys.

Cr. No. 799-62

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) On the evidence adduced at the remand hearing, was it clearly erroneous for the trial judge to rule that appellant had voluntarily confessed?

2) May appellant now seek a new trial on *Mallory* grounds when no such contention was raised at the initial trial, mentioned on appeal from the conviction, or encompassed within the purpose of the remand hearing? If so, do the facts reveal any violation of the *Mallory* rule?

3) Should the prior *en banc* decision be reconsidered, and its facts weighed again, absent a change in applicable law? May *Pate* v. *Robinson* be construed as supervening law?

INDEX

TABLE OF CASES

Cases—Continued

Cases—Continued

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,288

LAWRENCE W. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In 1960 appellant was indicted for several robberies (Cr. No. 891-60). Upon his own motion, he was sent to Saint Elizabeths Hospital for a ninety-day psychiatric examination. On March 17, 1961, the hospital certified appellant competent to stand trial, but stated that his alleged criminal acts were the product of a mental illness. On April 10, 1961, appellant stood trial, and the jury found him not guilty by reason of insanity. Pursuant to 24 D.C. Code § 301(d) he was committed to St. Elizabeths.

While still a patient at the hospital, appellant sallied forth without permission to stage several robberies. Within a few minutes after his last robbery, on August 9, 1962, appellant was apprehended (Tr. 91). Subsequent to his indictment for these robberies, appellant moved for a ninety-day psychiatric examination. At the conclusion of this examination, the hospital reported that appellant was competent to stand trial, that he was suffering from a mental illness, schizophrenic reaction, chronic undifferentiated type in remission, and that his criminal acts were not the product of this mental illness.

A trial produced his conviction for two robberies, the triers of fact having accepted psychiatric testimony that his mental disease was in remission at the time of the criminal acts, and that there was no causal connection between the disease and the crimes [1] (Tr. 282, 293, 307, 224, 192, 195, 203, 210).

On appeal from the judgment, this Court, sitting *en banc*, rejected the contention that the trial judge had committed reversible error by not *sua sponte* ordering a hearing on appellant's competence to stand trial. However, in accordance with the freshly enunciated command of *Jackson* v. *Denno*, 378 U.S. 368 (1964), this Court remanded the case for an explicit determination with respect to the voluntariness of the oral confession introduced at trial.

Following an extended remand hearing, the trial judge found beyond a reasonable doubt that appellant's confession was voluntarily given. The present appeal has been taken from this determination. The evidence that overwhelmingly sustains the trial judge's conclusion may be briefly summarized.

---

[1] Appellant asserted the defense of insanity and called three psychiatrists, but only one (Dr. Dabney) expressed an opinion that appellant's mental disease was related to the offenses (Tr. 216, 218). References to the transcript of the original trial are designated by "Tr.", and the hearing on remand by "RH".

The arrest and identification

At about 12:40 p.m. on August 9, 1962, appellant was arrested (RH Vol. I, p. 3; Vol. V, p. 240). This resulted from the fortunate coincidence that he happened to walk by the Fifth Precinct carrying a brown paper bag at the precise moment that the desk sergeant learned that an individual of appellant's description had just robbed a nearby real estate office. The desk sergeant noticed appellant outside, and directed another police officer to apprehend him. Upon his arrest, the law enforcement officers brought appellant inside the station. The paper bag contained $96.85 (Tr. 98). And as an officer attempted to search appellant, he "pulled out what appeared to be a .38 caliber snub-nosed pistol" from his pocket and dropped it on a table (Tr. 101). The weapon turned out to be an imitation. Apart from asking his name and address, the police did not question appellant at this time (Tr. 103). Instead, they immediately drove him to the scene of the alleged crime, only four blocks away, leaving at approximately 12:45 p.m. (RH Vol. I, p. 6).

On the way, an officer advised appellant that they were taking him to the real estate office for identification purposes, that he had a constitutional right to remain silent, and that any statements he made could be used against him (Tr. 105, 119; RH Vol. I, pp. 4-5, 13; Supp. Vol. p. 76). The police officer then asked him "if he wasn't the same fellow" that the police had arrested some time ago for another offense (RH Vol. I, p. 7). Getting an affirmative reply, the officer asked what had happened to that case. The appellant told him that he had been found not guilty by reason of insanity and sent to St. Elizabeths. This conversation was interrupted by their arrival at the real estate office.

There the employees identified him as the man who robbed them, and appellant "stated that this was the place he had held up." (Tr. 120; RH Vol. I, p. 15).[2]

---

[2] The record of the testimony at both the trial and the remand hearing refutes appellant's blatant misrepresentation that "there

Driving back to the precinct, the police officer resumed talking to appellant. In response to the officer's questions, appellant related that he had eloped from the hospital through a hole in the fence, caught a cab and rode over to the area of the crime, robbed the real estate office, and then walked to where the police caught him (Tr. 121-122; RH Supp. Vol. pp. 77-78). The conversation continued until they reached the precinct at approximately 1:00 p.m., a scant twenty minutes after appellant's arrest (RH Vol. V, p. 242). As he walked up the steps of the police station, appellant finished explaining that he had left the hospital the previous day to purchase the imitation gun (RH Vol. V, pp. 241, 265).

The prosecution introduced only the admission of guilt that appellant made when confronted by his victims at the scene of the robbery, varnished with the details that appellant related while being taken to the real estate office and returned to the police station.[3]

The appellant's demeanor

One police officer who talked to appellant upon his arrest thought that he appeared normal, and considered his "speech clear and understandable." (RH Vol. I, pp. 4, 10). Nor did the other officer who testified notice anything unusual about appellant's demeanor. On the contrary, he found appellant's conversation "logical and intelligent," and his answers responsive to the questions posed (RH Vol. I, p. 52).

---

is no dispute that the confession that was heard by the jury . . . was made back at the Fifth Precinct when the appellant was being interrogated." (Brief, p. 11). And were there even ambiguity as to the location of the confession used at trial, it would be due to appellant's own failure to raise the matter in timely fashion.

[3] The police spent another half an hour preparing the lineup sheets and reports of the incident, then took appellant to the D.C. Court of General Sessions, leaving the precinct at about 1:30 p.m. But the jury heard nothing that appellant might have said to members of the robbery squad during this period. Indeed, further inquiry apparently proved rather fruitless. One officer testified that appellant said, " 'You caught me in this one,' or words similar to that, and stated, 'If you think I have committed any other robberies prove it.' " (RH Vol. I, pp. 53-54, 82).

Psychiatric testimony

The appellant called two psychiatrists to testify in his behalf. The first of these, Dr. Ross, had formed no opinion as to whether the confession was "voluntary or involuntary," though he acknowledged that appellant was "oriented" at that time, and aware that he had been arrested and charged with robbery (RH Vol. II, pp. 7, 69-70, 75-76). On the basis of appellant's changes in mood and his lack of roots in the community, Dr. Ross felt that appellant had an "emotionally unstable personality with paranoid features" that made him dependent upon a highly structured environment (RH Vol. II, pp. 8, 12-13, 27, 60-61). And he reasoned that appellant's need for the security of confinement may have affected his understanding about the confession, in the sense that he "understood that he might be locked up as a result of the confession," but he did not realize that his preference for the ordered routine of the hospital may have motivated him to confess on an "unconscious level." Indeed, he explained that appellant might have "confessed purposely, intentionally, in order to get back there." (RH Vol. II, pp. 70-71, 82). Thus, Dr. Ross concluded that appellant "did not understand the full implications of what he was doing when he confessed" because he "does not understand the nature of his own personal freedom." (RH Vol. II, pp. 7, 34).

The other psychiatrist, Dr. Dabney, thought that appellant was a "paranoid schizophrenic" because he generalized from specific experiences, appeared guarded and evasive at a staff conference, and mumbled some of his answers at that conference (RH Vol. II, pp. 100, 108; Vol. III, pp. 17, 20). He stated that the "very dynamics of the paranoid schizophrenic would contraindicate such an individual making a voluntary admission," and so appellant could not have understood the meaning and effect of his confession. (RH Vol. II, pp. 102, 104-105). On cross-examination it developed that Dr. Dabney had only seen appellant at one staff conference, and that he previously noted in the hospital records that he had testified at trial

that appellant was merely "suffering from a schizophrenic reaction, chronic undifferentiated type." (RH Vol. II, pp. 9-12). And when asked to assume that appellant had made the statements attributed to him by the arresting officers, he simply refused on the ground that such a response by appellant would not be consistent with his diagnosis, and that his diagnosis could not be wrong.[4]

---

[4] The following excerpts are illustrative of Dr. Dabney's testimony:

Q. Are you testifying then, Doctor, that the assumptions I gave you just couldn't ever have occurred?

A. I didn't say that. I said that assuming the assumptions that you have given me to assume, you would be describing a person totally different from the individual I observed at the staff conference.

Q. And yet you said he couldn't have changed that much?

A. Not as a schizophrenic, no.

Q. So you are saying in effect that the assumptions are completely impossible?

A. Those assumptions do not fit a schizophrenic and—a schizophrenic in general. They do not fit a schizophrenic of the sub-type in particular.

Q. Have you ever been wrong in a diagnosis, Doctor?

A. I have made errors sometimes in dictation and signing something, but as far as an error in diagnosing a patient is concerned, no.

Q. You are testifying you couldn't possibly be wrong about this man's diagnosis?

A. I don't think so. Yes, I am testifying to that.

Q. That even assuming he made the statements that I have suggested to you that he made in 1962, even assuming that as facts, you couldn't be wrong in your diagnosis?

A. Well, you don't make an assumption of fact in my way of thinking.

THE COURT: She asked you to do that.

Q. I am asking you to assume that this is a fact. Now when you diagnosed perhaps you didn't know about these things that are alleged to have occurred, these statements he is alleged to have made.

If—assuming, that he made these statements, take it as fact, Doctor, that he did make them, is it possible that your diagnosis would change then?

A. No, my diagnosis would still be the same.

[Footnote continued on following page.]

[4] [Continued]

Q. Even assuming that he did do these things?

A. The assumption would not be valid based upon my—

THE COURT: Doctor, I must interrupt you. You are not to argue with the District Attorney as to the validity of the assumptions. She is asking you to assume it and answer the questions on that assumption, if you can.

* * * *

Q. Doctor, you have testified that my assumption is inconsistent with your diagnosis.

I am asking you to assume that the facts I gave you to occur, would that not perhaps change your diagnosis?

Take it as occurred. Take it as fact.

A. No, it wouldn't change my diagnosis.

Q. And yet you testified that it couldn't occur with your diagnosis.

A. I didn't say it couldn't occur. I am saying that it would be inconsistent with the Lawrence Green I observed in the staff diagnostic conference.

Q. Well, Doctor, considering that the assumptions I am asking you to make relate to events six months before you saw him, and considering that you didn't know about them at the time you saw him at the staff conference, might they not change your opinion as to his condition in 1962?

A. No.

Q. Why not?

A. Because the diagnosis of schizophrenic obviates my drawing that assumption or assumptive fact.

Q. But, Doctor, I am asking you and His Honor has directed you to assume that the facts did occur.

Now newly discovered evidence perhaps is being put before you, evidence you didn't know about when you made your diagnosis.

I am asking you to consider now and to think about whether it doesn't—taken as fact—whether it doesn't change your diagnosis?

A. No, it doesn't change my diagnosis.

Q. Even assuming it occurred?

A. Even assuming it occurred, it does not change my diagnosis.

Q. Assuming it occurred, was it voluntary?

A. Assuming it occurred, it would not in my opinion be voluntary.

Q. Why not?

A. Because of the man's mental condition.

[Footnote continued on following page.]

[4] [Continued]

Q. What mental condition?
A. Schizophrenic reaction.
Q. How does that affect whether this was voluntary or not?
A. If I may say, a schizophrenic, first of all, doesn't even admit that he is mentally ill—he or she is mentally ill.
Q. Doctor, the assumptions have nothing to do with an admission of mental illness. It has to do with the admission of commission of a crime.
A. The features of his illness would obviate such an assumption: denial, resistence, projection, he would attribute the responsibility of the set of assumptions to someone else; he would take no responsibility for it himself; denial, he would go off on a tangent and discuss some other things totally unrelated.
Q. But, Doctor, assuming that is not what happened, assuming he did not deny, assuming that he admitted it, would it have been voluntary?
A. Not in my opinion, no.
Q. Why not?
A. Because of his diagnosis.

* * * *

Q. Are you saying that he wouldn't have made these statements with his diagnosis or that they wouldn't have been made voluntarily with his diagnosis?
A. With the diagnosis of his mental illness, in my opinion he would not have said what I was asked to assume.
Q. Well, Doctor, please try and assume that he did say it.
A. Well, assuming that—
Q. Assume that—
A. —Assuming that he did say it, in my opinion it would not be voluntary.
Q. Why?
A. Because he wouldn't understand what he was saying.
Q. Why?
A. Because of the features of his illness.
Q. What features of his illness?
A. Projection.
Q. What—
A. Denial. Resistance. Negativism. Tangentiality.
Q. But, Doctor, he didn't deny it. He didn't—it wasn't negative. He answered the questions in the assumed question and he admitted it.
A. Assuming that he admitted it, it would not in my opinion by a voluntary admission. (RH Vol. III, pp. 45-51).

In response to this testimony, the Government called three psychiatrists from the staff of St. Elizabeths. They evaluated appellant's general mental condition in almost identical terms.[5] When appellant was committed to the hospital in 1961, Dr. Platkin found him "suffering from a schizophrenic reaction, chronic undifferentiated type." Thereafter, appellant made satisfactory adjustment, earned full ground privileges, and exhibited "no indication of any particular disturbance from a disciplinary point of view or a psychiatric point of view" at the time of his criminal escapades. "He seemed to be getting along well, and was, for the most part, without symptoms." (RH Vol. IV, pp. 133-136). Dr. Klinger described appellant as "a cooperative patient who went along with the hospital routine" and who "had shown continuous improvement" during his confinement (RH Vol. IV, pp. 75-76, 78, 81). On the basis of observation in February 1963, Dr. Owens diagnosed appellant as having a "schizophrenic reaction, chronic undifferentiated type in remission, meaning that the symptoms of the schizophrenia are no longer present, that he has recovered from them." (RH Vol. V, p. 201) In his opinion, appellant would certainly have been in remission on the date of the last robbery.

Indeed, in retrospect, Dr. Platkin concluded that appellant's previous symptoms were malingered and self-serving, an opinion shared to some extent by Dr. Owens and Dr. Ross.[6] In Dr. Platkin's words:

> I think he presented them very consciously with the hope that he would be found sick or that we would believe him to be of unsound mind. And it is my opinion that much, if not all, of these symptoms were actually malingered." (RH Vol. IV, pp. 142, 173, 176-178).

---

[5] Their opinions reflected the consensus of the hospital staff.

[6] Dr. Owens agreed that appellant's hallucinations were fabricated (RH Vol. V, pp. 225-226). And Dr. Ross testified that appellant was "feigning hallucinations" when he complained that he heard noises in his head, "going be-bop, be-bop." (RH Vol. I, p. 28).

This led Dr. Platkin to conclude that appellant was "not suffering from a mental disease or mental illness." (RH Vol. IV, p. 143).

These psychiatrists showed similar unanimity in their opinions as to appellant's state of mind when he confessed. Dr. Klinger testified that appellant would have experienced no difficulty grasping the fact that he had been arrested, and would have understood that he did not have to say anything to the police. For appellant was "in a superficial remission from a schizophrenic reaction, very fully aware of what is going on, in good and perfect contact with reality." (RH Vol. IV, pp. 89-91).

Dr. Platkin unequivocally concluded that appellant had the mental capacity "to make a voluntary statement, that is, a statement of his own free will." (RH Vol. IV, p. 178). He testified that appellant understood he had been arrested on a charge of robbery, that he could comprehend quite clearly the warnings he received, and that appellant's replies to the questions asked at the time of his arrest gave no indication of an abnormal reaction or mental disturbance (RH Vol. IV, pp. 143, 152).

Dr. Owens agreed that appellant had the mental capacity to make a voluntary statement or admission.[7] He further testified that appellant understood the reasonable implications of his confession, *i.e.*, he knew that if he told the police what had happened, he would be prosecuted, though, of course, appellant was aware that as an escapee he would probably be returned to the hospital rather than jail (RH Vol. V, p. 209). Dr. Owens felt that "his behavior at this time was what would be generally considered to be normal behavior because his illness was in remission." The appellant behaved and reacted as a normal individual would when stopped by the police (RH Vol. V, p. 210).

---

[7] The brief for appellant, p. 18, inaccurately states that the trial judge "sustained" an objection to this testimony. The record shows that he "overruled" the objection (RH Vol. V, p. 210).

SUMMARY OF ARGUMENT

In deciding the prior appeal, this Court remanded the case for a "determination by the trial judge as to whether or not the confession used against appellant in his trial was voluntary." Pursuant to this order, the trial judge received testimony from the arresting police officers and a number of psychiatrists over the course of several days. The credible evidence adduced at the hearing convinced the judge beyond a reasonable doubt that appellant had the mental competence to voluntarily confess, and that under the circumstances his confession was voluntary. The trial judge thus framed his conclusion in accord with the directive of this Court. This determination is not erroneous, much less "clearly erroneous." Accordingly, it should not be upset, and the conviction must be affirmed.

The appellant belatedly contends that his confession should have been excluded on account of unnecessary delay in his presentment. But this *Mallory* point was not raised at trial, not argued upon the previous appeal, and not encompassed within the scope of the remand hearing. Each of these reasons alone forecloses consideration of the *Mallory* issue broached on this appeal.

Even had a *Mallory* point been preserved, it would not entitle appellant to reversal of his conviction. The testimony on remand establishes that appellant's statements fall within the category of "threshold" or "spontaneous" utterances, and as such were admissible.

The prior *en banc* decision in *Green* held that the evidence and circumstances presented at trial did not require a *sua sponte* hearing into appellant's competence to stand trial. Bearing in mind the hospital's certification of competence, the lack of disagreement by the parties, and appellant's earlier commitment following an acquittal by reason of insanity in a separate case, the majority found that the trial judge had not abused his discretion in proceeding without a competency hearing. Nothing has happened subsequently that warrants reconsideration or repudiation of that holding. The appellant endeavors to

manufacture a conflict between the *Green* decision and the opinion in *Pate* v. *Robinson*. But the two cases are fully consistent in their underlying legal principles; the application of these principles to different fact patterns simply produced different results.

ARGUMENT

I. Appellant voluntarily confessed.

(RH Vol. I, 4-8, 13, 16-17, 43, 44; Vol. II, 75, 76, 82; Vol. IV, 178; Vol. V, 209, 210, 241, 265)

a. *The lower court's determination that appellant's confession was voluntary must be sustained unless "clearly erroneous."*

Upon review of the record and the contentions raised on the previous appeal, this Court, sitting *en banc*, remanded this case solely "for determination by the trial judge as to whether or not the confession used against appellant in his trial was voluntary." In order to make this judgment, the trial court conducted an exhaustive seven-day hearing, at which five psychiatrists gave lengthy testimony as to appellant's mental condition, and two of the arresting police officers described the circumstances surrounding appellant's confession. On the basis of this evidence, supplemented by the previous record, the hearing judge determined *beyond a reasonable doubt* that appellant "had the mental capacity to make the statements voluntarily," and that the confession was "voluntary." (Ruling of the Court, pp. 5, 8). He thus applied a standard higher than the one that now controls in this jurisdiction, *i.e.*, that the "confession should not be admitted in evidence unless the trial judge make a preliminary determination and an express finding *that on all the evidence he is satisfied* that the confession was voluntary when made." *Clifton* v. *United States*, —— U.S. App. D.C. ——, 371 F.2d 354, 359-360 (1966) (emphasis added).

These findings by the lower court must stand unless they are "clearly erroneous." *Jackson* v. *United States*, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965); *United States* v. *Poe*, 122 U.S. App. D.C. 163, 352 F.2d 639 (1965); *United States* v. *Page*, 302 F.2d 81 (9th Cir. 1962). The trial judge exercised sole responsibility to gauge the credibility of witnesses and to resolve questions of fact. The testimony elicited at the hearing convinced him beyond a reasonable doubt that appellant's confession was volntary. Under these circumstances, the trial court's conclusion is entitled to great respect. *Jackson* v. *Denno*, 378 U.S. 368, 390-391 (1964).[8] It should "not be disturbed unless manifestly against the weight of the evidence or unless the court has clearly committed an abuse of discretion." *People* v. *DeSimone*, 67 Ill. App. 2d 249, 214 N.E. 2d 305, 309 (1966); *Feguer* v. *United States*, 302 F.2d 214 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962).

b. Ample evidence supports the trial court's finding of voluntariness.

The voluntariness of appellant's confession depends upon whether it was the "product of an essentially free and unconstrained choice." *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1963). "The question in each case is whether the defendant's will was overborne at the time he confessed, *Lynumn* v. *Illinois*, 372 U.S. 528, 534. In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort. *Wilson* v. *United States*, 162 U.S. 613, 623." *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963). This test takes into account the circumstances surrounding the confession, the conduct of the police, and the character of the accused. See, *e.g.*, *Reck* v. *Pate*, 367 U.S. 433 (1961);

---

[8] See *Rouse* v. *United States*, 123 U.S. App. D.C. 348, 351, 359 F.2d 1014, 1017 (1966) (McGowan, J., concurring); *Smith & Cunningham* v. *United States*, 122 U.S. App. D.C. 300, 353 F.2d 838 (1965), *cert. denied*, 384 U.S. 910 (1966).

Fikes v. *Alabama*, 352 U.S. 191 (1957).[9] The appellant's mental condition bears on the ultimate question of admissibility to the extent that it can be deemed to have deprived his confession of its voluntary nature.[10] In other words, his mental illness must have been such that the confession did not represent a "meaningful act of volition." *Blackburn* v. *Alabama*, 361 U.S. 199, 211 (1960).

Given the present record, it borders on the frivolous to suggest that the trial court clearly erred in finding appellant's confession to be voluntary. The essentially uncontradicted testimony at the remand hearing disclosed that before making any statements, appellant had been advised of his right to remain silent and the fact that anything he said could be used against him. The oral statements introduced at trial were not obtained by any interrogative procedure. Rather, appellant confessed to the robbery when identified by the victims, and volunteered the supplemental information during the short trip to the scene of the crime (RH Vol. I, pp. 4-8, 13, 16-17, 43-44; Vol. V, pp. 241, 265). All of the statements heard by the jury were elicited within "30 to 45 minutes." In addition, the testimony of the arresting officers supports the following findings by the trial judge:

> When [appellant] made the statements in question he was calm and rational and gave responsive answers. His demeanor was normal in every respect.
>
> He did what might be normally expected of a man who was apprehended for a robbery, found with the proceeds of the robbery in his possession and a toy pistol simulating a real one, and had been identified by the victims.
>
> No promises of any kind were made to him. He was not threatened in any manner. He was not assaulted. There was no brutality or artifice or trickery

---

[9] Of course, the lack of counsel or the absence of proper warnings must also be considered in judging the voluntariness of a confession. *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

[10] See *McAffee* v. *United States*, 72 U.S. App. D.C. 60, 111 F.2d 199 (1940).

used to induce the statements or admissions. (Ruling of the Court, p. 7).

Thus, the circumstances surrounding appellant's confession clearly indicate that his will was not overborne.

With respect to appellant's mental condition, the psychiatric testimony offered by the Government not only justified but impelled the trial court's conclusion that appellant had the mental capacity to make a voluntary statement, and that his confession was voluntary. Both Dr. Owens and Dr. Platkin so testified (RH Vol. IV, p. 178; Vol. V, p. 210), pointing out that appellant's mental illness was in remission at the time of his arrest.[11] In their opinion, shared as well by Dr. Klinger, appellant undoubtedly understood that he had been arrested and charged with robbery, and comprehended the warning that he did not have to say anything about the crime. Moreover, Dr. Owens explicitly stated that appellant understood the reasonable implications of his confession, in the sense that he knew he could be prosecuted if he admitted his guilt (RH Vol. V, p. 209).[12] Dr. Ross, a psychiatrist called by the defense, also testified that appellant realized the consequences that might flow from his confession (RH Vol. II, pp. 75, 76, 82).[13]

It was clearly within the province of the trial judge to base his determination upon the above testimony.[14] And

---

[11] The testimony concerning appellant's behavior in the hospital plainly disclosed the mildness of his mental illness.

[12] The truncated summary of this testimony in appellant's argument is seriously misleading.

[13] Dr. Ross appended the qualification that while appellant understood he might be returned to confinement, he did not fully appreciate "his own personal freedom." This qualification has absolutely no relevance to the voluntariness of the confession as a matter of law.

[14] The trial judge disregarded the opinions of Dr. Dabney "because of his equivocation, unresponsiveness and parrying." He therefore found that "there was no credible psychiatric testimony that the statements were involuntary." (Ruling of the Court, pp. 7, 8). A cursory review of Dr. Dabney's testimony fully sustains the refusal to give him any credence.

the picture that emerges from this testimony leaves no doubt that appellant was competent at the time of his arrest and that his confession was voluntary.

The appellant's primary argument boils down to a complaint that the trial judge did not phrase his ultimate determination in terms of the reasons and findings that led him to conclude the confession was voluntary. But the integrity of the lower court's decision does not turn on the presence or absence of such a recital. See *Sims* v. *Georgia*, 385 U.S. 538, 544 (1967). The rulings of the trial judge, read together with the psychiatric testimony that he credited, show that the judge thoroughly considered the prerequisites of voluntariness, including the criterion emphasized by appellant. Having weighed the credibility of the expert witnesses, the trial judge chose to accept the testimony that appellant's mental illness did not render him incapable of making a voluntary statement, that appellant realized the nature of the charges arising from his arrest, that appellant fully understood the legal implications and probable consequences of his confession, and that appellant had reacted to his predicament as any normal person would have behaved.[15] This record furnishes more than adequate support for the trial judge's conclusion that the confession was voluntary. The judgment should therefore be affirmed.

---

[15] This testimony plainly satisfies the standard articulated in *People* v. *Tipton*, 48 Cal. 2d 389, 309 P. 2d 813 (1957), *cert. denied*, 355 U.S. 846 (1958).

II. Besides being untimely, appellant's *Mallory* contention has no merit.

(Tr. 104, 113, 117; RH Vol. I, pp. 3, 6-8, 16, 17, 30, 43, 44; Vol. V, pp. 241-242; Sup. Vol., pp. 156, 157, 213-218)

a. On this appeal from the limited remand hearing, appellant may not argue that his confession was obtained and admitted into evidence in violation of the* Mallory *rule.

Despite the fact that no such contention was made at the original trial, raised on appeal from his conviction, or encompassed within the scope of the remand hearing, appellant now labels those proceedings invalid on the ground that the police heard his confession before taking him to a magistrate. Even were this argument sound, it could not be broached at this late stage. The decision in *Coor* v. *United States*, 119 U.S. App. D.C. 259, 260, 340 F.2d 784, 785 (1964), *petition for rehearing en banc denied* (1965), clearly precludes consideration of appellant's belated assertions. *Coor* involved a remand hearing to determine the admissibility of certain statements under the *Mallory* rule, whereat the accused unsuccessfully tried to inject the issue of voluntariness. On appeal from the remand hearing, this Court ruled:

> The trial court correctly decided that whether or not the statements were in fact voluntary was irrelevant to the *Mallory* issue, and was therefore outside the proper scope of the hearing. Further, the issue of voluntariness is not properly before this court. No objection to the admissibility of the statements on the basis of involuntariness was raised at the trial . . . ."

This holding applies with at least equal force to the present situation.[16]

---

[16] Furthermore, a *Mallory* claim is not cognizable on collateral attack. *E.g., Moon* v. *United States*, 106 U.S. App. D.C. 301, 303, 272 F.2d 530, 532 (1959); *Plummer* v. *United States*, 104 U.S. App. 211, 212, 260 F.2d 729, 730 (1958); *(James) Smith* v. *United States*, 88 U.S. App. D.C. 80, 187 F.2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951).

It is well settled that a specific objection must be made at the trial level to preserve even a constitutional issue for appeal. *Schmerber* v. *California*, 384 U.S. 757, 765-766, n. 9 (1966); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) *(en banc)*, *cert. denied*, 383 U.S. 907 (1966). Since appellant never suggested at trial that his confession might have been obtained in violation of Rule 5(a), he irrevocably waived this point. *E.g.*, *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Williams* v. *United States*, 113 U.S. App. D.C. 7, 303 F.2d 772, *cert. denied*, 369 U.S. 875 (1962). Indeed, present counsel considered the *Mallory* issue not worth mentioning on the appeal from appellant's conviction.[17]

Moreover, the disposition of the prior appeal must be deemed to have settled the *Mallory* issue.[18] For this Court remanded the case solely for a determination as to the voluntariness of appellant's confession, and explicitly held that "if the confession is found to have been voluntary, the conviction will be affirmed." The lower court thus had no authority to probe whether there was "unnecessary delay" in taking appellant before a judicial officer. *United States* v. *Allegrucci*, 309 F.2d 934 (3d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).[19] It appropriately considered

---

[17] At the trial of this case counsel objected to the oral confession on the sole ground that it was not voluntary due to appellant's mental condition. Judge Pine rejected this contention (Tr. 104, 113-117). Though present counsel did not challenge this ruling on appeal, the Government suggested that the intervening decision of *Jackson* v. *Denno*, 378 U.S. 368 (1964), required an explicit finding by the trial court as to the voluntariness of the confession. This prompted the remand.

[18] This Court has already focussed attention upon the admissibility of appellant's confession. But neither the majority nor dissenting opinion contains the slightest intimation that the confession should have been excluded as made during a period of unnecessary delay. Had error in this respect been manifest, immediate reversal would have followed. rather than a remand for an unnecessary and futile hearing.

[19] *Cf. Callanan* v. *United States*, 274 F.2d 601, 605 (8th Cir. 1960); *Dorrough* v. *United States*, 344 F.2d 125 (5th Cir. 1965); *Smith* v. *United States*, 118 U.S. App. D.C. 133, 332 F.2d 720

the possible violation of Rule 5(a) only as it indirectly related to the issue of voluntariness (RH Supp. Vol., pp. 156-157, 213-218).

b. *Even were this issue open for consideration, the facts reveal no violation of the* Mallory *rule.*

In any event, appellant's *Mallory* contention patently lacks substance.[20] The only admissions introduced at trial were made in a continuous conversation between appellant and police officers, which took place during the short excursion from the precinct to the real estate office (RH Vol. I, pp. 6-8, 16, 17, 30, 43, 44; Vol. V, p. 241). The trial judge found that the whole process consumed not more than 30 to 45 minutes (Ruling of the Court, p. 6).[21] It has been consistenly held that the *Mallory* rule does not work to exclude "spontaneous" or "threshold" utterances of this type. *E.g.*, *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F.2d 743, *cert. denied*, 379 U.S. 840 (1964); *Oliver* v. *United States*, 118 U.S. App. D.C. 302, 335 F.2d 724 (1964); *Gardiner* v. *United States*, 116 U.S. App. D.C. 270, 323 F.2d 275 (1963), *cert. denied*, 375 U.S. 976 (1964); *Hughes* v. *United States*, 113 U.S. App. D.C. 127, 306 F.2d 287 (1962); *Naples* v. *United States*, 113 U.S. App. D.C. 281, 307 F.2d 618 (1962) *(en banc)*; *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 250 F.2d 30 (1957).[22]

(1964), *cert. denied*, 379 U.S. 855 (1964); *Washington Sportservice, Inc.* v. *M.J. Uline Co.*, 114 U.S. App. D.C. 215, 313 F.2d 889 (1962).

[20] Of course, the burden of showing an unreasonable delay rests upon appellant. See *Trilling* v. *United States*, 104 U.S. App. D.C. 164, 260 F.2d 677 (1958) (*en banc*).

[21] The police officer estimated that the trip took only 20 minutes (RH Vol. I, p. 3; Vol. V, p. 242).

[22] For instance, in *Perry* v. *United States*, 121 U.S. App. D.C. 29, 347 F.2d 813 (1964), the accused confessed fifty minutes after the police knew they had the right man, and after he had twice refused to speak about the shooting. This Court nonetheless concluded that his oral statements were admissible as threshold utterances.

The spontaneity of appellant's confession is underscored by

The *Mallory* rule precludes only the use of statements obtained during an *unnecessary* delay in taking the accused to a judicial officer. And in the circumstances of this case, the mere four-block drive to the real estate office did not involve unnecessary delay. Although the police had arrested appellant on glaring probable cause, they reasonably desired to confront him with the victims, and to determine whether he could be positively identified as the robber. This procedure was calculated to make certain that the police had arrested the right man. *Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 353 F.2d 426 (1965); *Proctor* v. *United States*, 119 U.S. App. D.C. 193, 338 F.2d 533 (1964), *cert. denied*, 380 U.S. 917 (1965).[23] Had the officers taken appellant directly to the magistrate after his identification at the scene of the robbery, the same opportunity for conversation would have been present as occurred on the ride to the precinct.[24] Accordingly, the police did not impair appellant's right to reasonably expeditious presentment.

III. This Court should adhere to its prior *en banc* decision that the circumstances did not obligate the trial judge to conduct a *sua sponte* hearing into appellant's competence to stand trial.

a. *The decision in* Green v. United States, *122 U.S. App. D.C. 33, 351 F.2d 198 (1965).*

This Court, sitting *en banc*, has already held that the trial judge did not abuse his discretion by making no formal inquiry as to appellant's competence to stand trial. The opinion stressed that, pursuant to 24 D.C. Code § 301

---

the facts that he was advised of his right to remain silent and that he did not initially deny his guilt.

[23] *Cf. Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959).

[24] Of course, any subsequent delay in presentation to the magistrate is immaterial. *E.g., United States* v. *Mitchell*, 322 U.S. 65 (1944).

(a), the hospital had examined appellant and certified him competent to stand trial, and that neither the defense nor prosecution had objected to this certification. It further reasoned that appellant's 1961 commitment following his acquittal by reason of insanity did not necessarily diminish his competence to stand trial in 1963, the prior commitment not being an "adjudication of insanity or incompetency." Relying on *Whalem* v. *United States*, 120 U.S. App. D.C. 331, 346 F.2d 812 *(en banc)*, *cert. denied*, 382 U.S. 862 (1965), the majority concluded that the facts adduced by appellant failed to show that he had been entitled to a competency hearing.

b. *There is no supervening law that would justify departure from the "law of the case."*

Appellee submits that the validity of the previous *en banc* decision has not been affected whatsoever by the holding in *Pate* v. *Robinson*, 383 U.S. 375 (1966), that a state judge should have conducted a hearing when substantial doubt as to the accused's competence to stand trial arose. The *Pate* v. *Robinson* opinion simply paraphrases the law followed in this jurisdiction at the time that *Green* and *Whalem* were decided. For the decisions in *Green* and *Whalem* acknowledged that the trial judge has a duty to order a hearing if circumstances of record render the accused's competence "substantially suspect."[25] It is just that neither case involved sufficient evidence of incompetence to trigger this duty. Compare *Pouncey* v. *United States*, 121 U.S. App. D.C. 264, 265, 349 F.2d 699, 700 (1965). In short, *Green*, *Whalem*, and *Pate* v. *Robinson* represent applications of the same legal principle to different sets of facts.

The decision in *Pate* v. *Robinson* lays primary emphasis upon defense counsel's insistence throughout the trial that the accused lacked present mental competence, and the

---

[25] *Whalem* v. *United States*, 120 U.S. App. D.C. at 335, 346 F.2d at 816. The subsequent collateral proceedings mentioned in appellant's brief are irrelevant to this question.

prosecutor's own suggestion that the court should hear expert testimony on this issue. It concluded that these facts, taken together with testimony that disclosed the accused's lengthy history of serious mental disturbance and the absence of an effective mental examination or certification, so manifested the accused's possible incompetence that the trial judge should have conducted a hearing to resolve that question.[26]

On the contrary, the facts developed at appellant's trial gave not the slightest indication he was "unable to understand the proceedings against him or to properly assist in his own defense." 24 D.C. Code § 301(a) (1961); *Dusky* v. *United States*, 362 U.S. 402 (1960). Appellant has never been adjudged by any court or diagnosed by any psychiatrist as being incompetent to stand trial. Indeed, on two separate occasions the hospital certified him competent to stand trial, and counsel made no objection to such certification. While appellant's 1961 trial for robbery resulted in an acquittal by reason of insanity, the jury in the present case held him criminally responsible for his later offenses, the psychiatric testimony having established that appellant's mental illness was in remission and that his acts were consequently not the product of this mental illness. These facts were argued on the previous appeal, but failed to persuade a majority that the trial judge abused his discretion by proceeding without a competency hearing. The mere passage of time has added no luster to these facts, and subsequent decisions give no cause to re-evaluate them.

The appellant's effort to overturn the previous *en banc* decision founders upon an egregious misreading of the *Whalem* opinion, and a corresponding misconception of the ruling in *Green*. The majority in *Whalem* carefully defined the import and extent of its decision:

---

[26] The opinion noted that the stipulation as to a doctor's findings two or three months before trial could not properly be deemed dispositive on the issue of competence. *Pate* v. *Robinson*, 383 U.S. at 384-386.

> "In holding that a trial judge may proceed to trial on the basis of the hospital's certification of competency when no objection is made thereto, we neither say nor imply that he *must* do so merely because the hospital's report is not objected to by either of the parties. Unquestionably a trial judge is always free to pursue whatever inquiry into the question of an accused's competency he feels necessary. He *may* conclude that the hospital's report is inadequate and *sua sponte* request an elaboration of the report or order a hearing, and indeed, there may be cases in which, on the basis of what he knows and can see about the accused, he should do so, notwithstanding the certification. We only hold that he is not *bound* to hold a hearing on the issue of competency when an accused is certified to be competent and there is no objection to such certification.
>
> Since, as we hold, the desirability of a hearing on the matter of competency following receipt of the hospital's report that the accused is competent is a question that lies within the discretion of the trial judge when the report is not objected to by either party, the real question before us is whether the failure to hold such a hearing in this case constituted an abuse of discretion." [27]

And the dissent noted that "the court properly rejects the view . . . that hospital reports respecting competency are binding on the trial court" in the absence of objection, and agreed with the holding that certain circumstances may require the judge to order a competency hearing *sua sponte*. Thus, the dissent quarreled only with the determination that the trial judge did not abuse his discretion to inquire further into the accused's competence.[28]

The majority in *Green* likewise concluded, over vigorous dissent, that the circumstances did not indicate that

---

[27] *Whalem* v. *United States*, 120 U.S. App. D.C. at 335-336, 346 F.2d at 816.

[28] *Whalem* v. *United States*, 120 U.S. App. D.C. at 339, 346 F.2d at 820 (Bazelon, C.J., dissenting).

the trial judge had abused his discretion by proceeding without a competency hearing.[29] It relied upon *Whalem* for the proposition that prior commitment to a mental institution, standing alone, did not require the trial judge to go behind the certification of competence. In this respect, it stressed the well-settled distinction between competence to stand trial and mental illness that excuses criminal conduct. See, *e.g.*, *Winn* v. *United States*, 106 U.S. App. D.C. 133, 135, 270 F.2d 326, 328 (1959), *cert. denied*, 365 U.S. 848 (1961); *Overholser* v. *Leach*, 103 U.S. App. D.C. 289, 257 F.2d 667 (1958); *United States* v. *Bostic*, 206 F. Supp. (D.C. D.C. 1962), *aff'd.*, 115 U.S. App. D.C. 79, 317 F.2d 143 (1963).

Nothing in *Robinson* v. *Pate* affects the soundness of the prior *en banc* decision.[30] The *Whalem* and *Green* decisions clearly show that this Court has applied the legal principles reiterated in *Pate* v. *Robinson*. Further discussion would only belabor the obvious point that the circumstances faced by the trial judge define his obligation to hold a competency hearing, and that the results in *Whalem*, *Green*, and *Pate* v. *Robinson* rest upon each case's unique facts.[31] The prior *en banc* decision reflects

---

[29] The *Green* opinion nowhere suggests, as erroneously asserted by appellant, that failure to object to the certification of competence amounts to a waiver of the right to a judicial hearing on the accused's competence to stand trial. The contemporaneous decision in *Pouncey* v. *United States*, 121 U.S. App. D.C. 624, 349 F.2d 699 (1965), demonstrates beyond peradventure that the Court in *Green* recognized that counsel's failure to object to certification of competence did not diminish the judge's duty to ensure the competence of the accused to stand trial.

[30] Significantly, the Supreme Court denied a petition for certiorari in *Whalem* the same Term that it decided *Robinson* v. *Pate*.

[31] The appellant seemingly contends that his record of mental illness assumes gargantuan significance in the wake of *Pate* v. *Robinson*. But *Pate* v. *Robinson*, merely holds that the trial judge should consider evidence of mental disturbance as a factor that bears upon the competence of the accused. The weight accorded this evidence necessarily depends upon the seriousness of the symptoms and their degree of manifestation at trial.

On the prior appeal, counsel unsuccessfully urged that appellant's

the full consideration of pertinent circumstances under the appropriate legal standards. It should not be disturbed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
CAROL GARFIEL,
LEE A. FREEMAN, JR.,
Assistant United States Attorneys.

---

history of mental illness required competency hearing by the trial judge. And though it marshaled all the "special circumstances," the dissent still failed to carry the day. Appellant should not be permitted to relitigate this issue.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 263001 890